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No. 85-

In the
Supreme Court of the United States.

OCTOBER TERM, 1984.

WILLIAM J. MARTIN,
PETITIONER,

v.

DIGHT W. CRAIN, PETER H. GARLAND,
J. VINCENT SAUNDERS, MARSHALL LEBOWITZ,
MARK H. RAIDER, PAUL AMBLER,
AND PAMELA J. KAUFMAN, AS THEY ARE
MEMBERS OF THE NATICK SCHOOL COMMITTEE
AND JOSEPH A. KEEFE, SUPERINTENDENT
OF SCHOOLS OF THE TOWN OF NATICK,
RESPONDENTS.

Petition for Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

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53P

Questions Presented.

I. Whether the Supreme Judicial Court of the Commonwealth of Massachusetts is in conflict with applicable decisions of the Supreme Court when the state court upheld as constitutional on its face that portion of M.G.L. c. 71, § 42D, which permits school officials to suspend a tenured public school teacher for five days without notice, hearing or any other procedures.

II. Whether the Supreme Judicial Court erred in finding that the petitioner Martin received a post-termination hearing on his five-day suspension and that, thus § 42D was constitutional as applied in this case.

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WILLIAM J. MARTIN,
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DIGHT W. CRAIN, PETER H. GARLAND,
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AND JOSEPH A. KEEFE, SUPERINTENDENT
OF SCHOOLS OF THE TOWN OF NATICK,
RESPONDENTS.

Petition for Writ of Certiorari
to the Supreme Judicial Court
for the Commonwealth of Massachusetts.

The petitioners respectfully pray that a writ of certiorari issue to review the decree and opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts entered on the proceeding on December 10, 1984.

Opinions Below.

The opinion of the Supreme Judicial Court of Massachusetts is reported at 393 Mass. 430 (1984) and is reproduced at page 2a of the appendix. The opinion of the trial court is not reported but is reproduced at page 10a of the appendix.

Jurisdiction.

The decree of the Supreme Judicial Court of the Commonwealth of Massachusetts was entered on December 10, 1984. This petition is being filed within ninety days of December 10, 1984. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

Constitutional and Statutory Provisions.

Constitution of the United States, Amendment XIV, Due Process Clause:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law;
>
> State Statutes: M.G.L. c. 71, §§ 42 and 42D (A. 29a, 32a); M.G.L. c. 71, § 43A (A. 33a); Ala. Code § 36-26-38.

Statement of the Case.

William Martin, the petitioner, was employed as an elementary school teacher in Natick for twenty-four (24) years. He was a tenured teacher at all times material to this case.

On or about January 15, 1980, Martin filed a grievance with the Natick Teachers Association charging that his principal, John Crisafulli had, without cause, requested that he resign from his position as a school teacher in the town of Natick. The grievance also alleged that, because Martin failed to comply, Crisafulli began, on a daily basis, to harass and criticize him personally in his classroom. On January 18, 1980, the Superintendent of the Natick Schools, Joseph A. Keefe, after learning of the grievance against Mr. Crisafulli, called Martin to Keefe's office and advised him that he should resign his position as a school teacher in the town of Natick. At the January 18 meeting, Mr. Martin was accompanied by counsel. At that meeting on January 18, Mr. Martin was asked to resign. He was told that he had until Monday, January 21, 1980 to decide whether or not he wanted to resign. At no time during that meeting was he informed of any intention on the part of the Superintendent to suspend him or was he informed of the activity that was supposed to be the reason for the suggested resignation. On January 21, 1980, Martin, accompanied by counsel, once again appeared in the office of Superintendent Keefe. At that time, Dr. Keefe inquired as to whether Mr. Martin would resign from the Natick School System and Mr. Martin said that he would not. During the meeting, no charges were advanced by Keefe against the petitioner regarding his function as a teacher. Yet, Dr. Keefe notified Martin and his attorney that the Superintendent would suspend Martin for five days. On the same day, Keefe sent Martin a letter informing him simply that "I hereby notify you that I have suspended you for the week of January 21-25, 1980". No reasons were

advanced for this suspension. Mr. Martin was not informed in this January 21, 1980 letter as to what he was accused of to warrant the suspension nor was he informed as to the basis of any accusations. On that same day, Keefe sent Martin a second letter informing him that Keefe intended to recommend an additional suspension to the School Committee ("Committee") at its regular meeting on January 29, 1980 for "unbecoming conduct or other good cause". On that day as well, a letter was also sent from Martin's attorney to the Chairman of the Committee. In this letter, the petitioner's attorney asked the Committee for the details and specifications of the "charge or charges against Martin and the cause or causes for which the (five-day) suspension was imposed." A copy was sent to the Superintendent of Schools, Joseph A. Keefe. On January 24, 1980, Keefe responded to the January 21 letter from the attorney, by quoting the reasons, not for the five-day suspension, but rather for the causes upon which the anticipated suspension would be heard on January 29, 1980. The January 24, 1980 letter notified Martin as to three areas upon which Keefe would recommend Martin's suspension: grading students lower than they should be graded; inefficiency in teaching as reflected by three years' evaluations; incapacity as a teacher as reflected in three years' evaluations. Martin's attorney, by letter dated January 25, 1980 requested a hearing regarding the five-day suspension and on the future suspension anticipated by the Superintendent.

On January 28 and 29, Martin was placed on a paid leave of absence. On January 29, the day of the hearing, Martin's attorney again asked in writing for the reasons for the five-day suspension. The Committee did not respond to these requests. In the hearing, when the petitioner's attorney asked the Chairman of the Committee, Mr. Crain, if Martin was going to receive a hearing on the five-day suspension previously imposed, Chairman Crain answered "Not tonight" (A. 27a). The

hearing on the additional suspension contemplated by the Superintendent's January 24 letter, was conducted on the evenings of January 29 and 30, 1980. The Committee voted to suspend Martin for thirty (30) days for the reasons set forth in the January 24, 1980 notice.

The petitioner filed a complaint in the Superior Court of the Commonwealth seeking, *inter alia*, declaratory relief relative to the five-day suspension alleging that he had been deprived of Due Process. After a hearing on defendants' motion for summary judgment, the Superior Court judge held that the portion of M.G.L. c. 71, § 42D which allowed for the five-day suspension of a tenured teacher without procedures was unconstitutional (A. 10a).

The Supreme Judicial Court accepted direct appellate review of the matter. It held that the Massachusetts suspension statute is constitutional in spite of the fact that it provides no procedures in connection with the five-day suspension of a tenured teacher (A. 7a). The Supreme Judicial Court also held that because Martin was subsequently given a hearing on his thirty (30) day suspension, that the question of whether § 42D implicates a requirement for disclosure of the reasons for the five-day suspension did not need to be addressed (A. 6a, 7a).

Reasons for Granting the Writ.

I. The Decision of the Supreme Judicial Court for the Commonwealth of Massachusetts Is In Conflict with the Applicable Decisions of the Supreme Court in Upholding that Portion of M.G.L. c. 71, § 42D Which Permits the Suspension of a Tenured School Teacher for Five Days Without Any Due Process Procedures.

The petitioner argued below that because he cannot be terminated except upon good cause, that he has a "property interest" in continuous, uninterrupted employment and, further, that he is guaranteed by the Due Process Clause, Amendment XIV of the Constitution of the United States, to certain procedures in connection with the removal of that property interest. The Supreme Judicial Court held that the Massachusetts suspension statute, M.G.L. c. 71, § 42D, is constitutional in spite of the fact that it provides no procedures whatsoever in connection with the five-day suspension of a tenured teacher. This judgment is not in conformity with the principles advanced by this Court. See *e.g.*, *Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Arnett* v. *Kennedy*, 416 U.S. 134 (1974); *Goss* v. *Lopez*, 419 U.S. 565 (1975). See also, *Best* v. *Boswell*, 696 F.2d 1282 (11th Cir. 1983).

A. *Section 42D is Unconstitutional on its Face.*

As regards the first issue raised in this petition, it is submitted that § 42D is unconstitutional on its face. The petitioner is a tenured teacher in the Commonwealth and, thus, his employment cannot be terminated except upon "good cause". M.G.L. c. 71, § 42 (A. 29a). In *Arnett* v. *Kennedy*, 416 U.S. 134 (1974) a majority of the Justices of this Court held that once a Legislature insists a public employee may not be dismissed

except upon "cause", that said employee is entitled to a hearing to prove "cause". *Cf., Board of Regents* v. *Roth*, 408 U.S. 564, 570 (1974).

As Justice Powell asserted in a concurring opinion in *Arnett*:

> The right (to procedural due process) is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.

416 U.S. at 167.

While Justice Rehnquist, writing for a plurality of this Court, concluded in *Arnett, supra*, that the procedures or lack of them, by which "cause" is to be determined limits the employee's property interest, subsequent Supreme Court decisions dispute this limitation on Due Process. In *Goss* v. *Lopez*, 419 U.S. 565 (1975), the Court held that a state-guaranteed right to education constituted a property interest adequate to warrant due process in connection with a ten-day suspension of a student. In citing examples of various property interests recognized by the Supreme Court, Justice White observed:

> Accordingly, a state employee who under state law, or rules promulgated by state officials, has a legitimate claim of entitlement to continued employment absent sufficient cause for discharge may demand the procedural protections of due process.

419 U.S. at 573.

Thus, *Goss* endorses the theory that once the state provides that an employee cannot be removed unless "cause" is demonstrated, the sovereign is compelled by the federal constitution to provide some due process procedures. Moreover, *Goss* provides that in most cases, Due Process requires at least a rudimentary, pre-deprivation hearing and notice unless emergency requires immediate removal. In that event, post-deprivation procedures would suffice, see *Goss*, 419 U.S. at 582; *accord, Arnett* v. *Kennedy*, 416 U.S. at 194 (White, concurring opinion).

In the case sub judice, because the petitioner cannot be terminated except upon "good cause" he has a property interest in stable, continued employment with the Natick School Department absent certain constitutionally-guaranteed due process procedures. To assert, as the Supreme Judicial Court does (A. 6a), that the petitioner has no property interest in the five days he was suspended because no procedures are included in the statute in connection with such a suspension, misapprehends Supreme Court precedent. The *Goss* Court was emphatic, that once a property interest is created, it cannot be removed completely or "in chunks":

> A short suspension is, of course, a far milder deprivation than expulsion. But, "education is perhaps the most important function of state and local governments," . . . and the total exclusion from the educational process for more than a trivial period . . . is a serious event in the life of the suspended child. Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary.

419 U.S. 576 (citations omitted).

Because Martin has a property interest in continued employment, the loss of five days' work or several hundred dollars' salary is not so trivial that it may be arbitrarily removed. The only inquiry is into the extent of the procedures applied in light of the "weight" of the property interest balanced against the interest of the employer. *Goss* v. *Lopez*, 419 U.S. at 576; *Arnett* v. *Kennedy*, 416 U.S. at 194 (White, concurring opinion).

Similarly, the Eleventh Circuit has struck down as unconstitutional an Alabama statute which allowed the "preemptory" suspension of a permanent, merit system employee without the benefit of notice or hearing. In *Best* v. *Boswell*, 696 F.2d 1282 (11th Cir. 1983) the Court, approving the district court's reliance on *Goss*, held:

> The Alabama Code invests state merit system employees with a protected property interest. Thus, before that interest can be suspended, employees "must be given *some* kind of notice and afforded *some* kind of hearing." . . . We need not decide the nature of the opportunity to be heard which should be provided . . . but only agree with the district court's conclusion that the statute's unequivocal statement "without the right to a hearing"[1] is unconstitutional."

696 F.2d at 1290.

Decisions in the Commonwealth also support the proposition that a tenured teacher may not be deprived of part of his property interest without cause even though M.G.L. c. 71, § 42

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[1] An appointing authority may, from time to time, preemptorily suspend any employee without pay or other compensation and without the right of a hearing as punishment for improper behavior, but such suspension . . . shall not exceed 30 days. Alabama Code Section 36-26-28.

does not provide specific procedures for such partial taking. See *Setterlund* v. *Groton-Dunstable Regional School Committee*, 382 Mass. 328 (1981) where the Supreme Judicial Court held that the reduction of a tenured teacher to half-time was adequate to warrant the right to appeal to Superior Court pursuant to the Tenure Law's appeal procedure to ascertain the adequacy of "cause". Stated the Court:

> The tenure provisions . . . were intended to protect experienced and veteran teachers against capricious, fickle and irregular exploits of school boards. . . . And limiting the application of "removed" or "dismissed" to instances of complete termination would — as a practical matter — totally obliterate the protection intended by the statute. If this were the case, a board could nibble away and reduce one's employment until economic necessity forced the tenured teacher to resign.

382 Mass. at 331-332.

The Supreme Judicial Court's reliance upon *Milne* v. *School Committee of Manchester*, 381 Mass. 581 (1980)[2] and *Boston Teachers Union, Local 66* v. *School Committee of Boston*, 386 Mass. 197 (1982) is misplaced (A. 7a). Neither case addressed the issue of what predeprivation procedures are required in order to establish whether substantive "cause" exists. Rather, the court determined, that in the limited situations of declining enrollment (*Milne*) or budgetary restaints (*Boston*

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[2] *Bishop* v. *Wood*, 426 U.S. 341 (1976) which was cited by the Supreme Judicial Court in *Milne* is not instructive in this case which involves a teacher who has a property interest in continued employment due to the fact he may only be dismissed upon "cause". In *Bishop*, the Supreme Court found that the North Carolina District Court had interpreted the law as omitting a "cause" requirement relative to the dismissal of a public employee, thus no property interest in uninterrupted employment attached.

Teachers Union) substantive, good "cause" exists as a matter of law. Moreover, it is erroneous to assert that the teacher in the budgetary crisis or declining enrollment situation is given no procedure whatsoever. The teacher has the right to a full, evidentiary hearing guaranteed by the M.G.L. c. 71, § 43A (A. 33a) where she/he claims the reasons advanced are a "sham" or "subterfuge", *Boston Teachers Union*, 386 Mass. at 216.

In the instant case, no specific situations that could give rise to the substantive concepts of the "unbecoming conduct" or "any other cause" described in § 42D have yet been identified as a matter of law. Even if they were, however, because such situations relate specifically to teacher conduct, about which he has knowledge and over which he has control unlike declining enrollment, it is productive to give the teacher an opportunity to deny the charged conduct.

B. *Section 42D is Unconstitutional as it Was Applied to Martin Because the Reasons for his Five-Day Suspension Were Never Disclosed to Him by a Post-Deprivation Hearing or by Any Other Means.*

Despite his requests, Martin was not given a hearing on his five-day suspension. The Supreme Judicial Court misreads the record in its assertion that the subsequent hearing on January 29, 1980 relative to the thirty-day suspension would satisfy a requirement for a hearing on the short suspension. This is because the Committee specifically refused to provide him with a hearing on January 29 for the unstated charges relative to the five-day suspension (A. 27a). Moreover, nowhere else in the record is there any evidence that, despite the repeated written requests of his attorney, that Martin was ever given a hint at the conduct in which he engaged that was unacceptable enough to warrant a five-day suspension. The meetings of

January 18 and 21 were not instructive as to the reason for his suspension. Quite the contrary, as opposed to constituting the rudimentary prior notice and hearing required by *Goss*, there is no dispute that the only communication forthcoming from the Superintendent at those meetings was a demand that Martin resign. That Martin was accompanied by an attorney at both meetings does not elevate the meetings to the process due to Mr. Martin. It is again not disputed that the Superintendent refused to provide the attorney with any information that would serve as notice of the complaint the school had against Martin, much less provide him with a hearing.

Ironically in this regard, the Supreme Judicial Court concludes that because there is nothing in the record that shows that the reasons for the thirty-day suspension which were advanced at the January 30, 1980 hearing are any different than the unstated reasons for the five-day suspension, that the petitioner's Due Process rights were intact (A. 6a). A statute must be construed in a way so as to render it constitutional. *Commonwealth* v. *King*, 374 Mass. 5 (1977). If the Supreme Judicial Court's conjecture as to reasons for the short suspension were proven by the record, it would be fatal to any hope of constitutional application of § 42D. This is so because the only constitutional construction of this section that would allow the Committee to summarily remove the teacher would be where the teacher is so dangerous or disruptive that he needs to be kept away from impressionable students. *Cf.*, *Goss*, 419 U.S. at 582. In such a situation, abbreviated procedures or post-deprivation procedures may be constitutionally justified. There is no constitutional justification for preemptory removal of a tenured teacher with no procedure at all for alleged poor teaching technique.

In light of the fact that the last paragraph of § 42D contemplates behavior that could be dangerous, it is conceded that in certain, limited cases, a hearing could follow suspension.

419 U.S. at 582. However, it is submitted that pre-deprivation procedure is required in Martin's case because there appears nothing on the record to indicate that Martin was "dangerous", *Goss*, 419 U.S. at 582. Such procedures would have given him an opportunity to meet and dispel the stigma of "unbecoming conduct" which is now dogging Martin in his personnel record.

Conclusion.

In light of the foregoing, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

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On the Brief:
SANDRA C. QUINN

Appendix.

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COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,

AT BOSTON, December 10, 1984.

IN THE CASE NO. SJC — 3434

WILLIAM J. MARTIN

vs.

SCHOOL COMMITTEE OF NATICK & another
pending in the Superior Court Department of the Trial Court for the County of Middlesex No. 80-1075

ORDERED, that the following entry be made in the docket; viz., —

The judgment of the Superior Court is reversed in so far as it was granted in favor of the plaintiff with respect to the five-day suspension. Judgment for the defendants is to be entered. The judgment in favor of the defendants with respect to the thirty-day suspension is affirmed.

BY THE COURT,

/s/ Jean M. Kennett, CLERK.

December 10, 1984
See opinion on file.
A TRUE COPY
ATTEST: /s/ _____ March 5, 1985
Frederick J. Quinlan, Asst. Clerk
Supreme Judicial Court for the Commonwealth

WILLIAM J. MARTIN *vs.* SCHOOL COMMITTEE OF NATICK & another.[1]

Middlesex. September 12, 1984. — December 10, 1984.

Present: WILKINS, LIACOS, NOLAN, LYNCH, & O'CONNOR, JJ.

Due Process of Law, Suspension of teacher, Notice, Hearing. *School and School Committee*, Suspension of teacher.

The summary five-day suspension provision of G. L. c. 71, § 42D, was not unconstitutional as applied to a tenured teacher suspended for five days by the superintendent of schools, where the teacher was subsequently given a hearing preceding an additional thirty-day suspension by the school committee and where the record, which disclosed the reasons for the thirty-day suspension, gave no indication that they differed from the reasons for the five-day suspension. [ ]

In an action by a tenured school teacher challenging the legality of a summary five-day suspension by the superintendent of schools and a second, thirty-day, suspension by the school committee following notice and hearing, there was no merit to the plaintiff's contention that the notice he received before the hearing on the second suspension was deficient because it did not specifically advise him that a second suspension was to be considered and did not specify the length of the proposed suspension. [ ]

In the circumstances, a school committee conducting a hearing on charges against a tenured teacher was not arbitrary or capricious in denying a request for a continuance made by the teacher's attorney about 1 A.M. on the second night of the hearing when the attorney informed the chairman of the committee that he was too tired to continue. [ ]

On appeal by a tenured teacher challenging the validity of a thirty-day suspension, this court did not consider whether there was sufficient evidence before the school committee to substantiate the charges against the teacher, where the record on appeal contained only a few excerpts from the transcript of the hearing before the school committee. [ ]

[1] The superintendent of schools of Natick. We acknowledge the amicus briefs filed by the Attorney General, the Massachusetts Teachers Association, the Massachusetts Association of School Superintendents, Inc., and the Massachusetts Association of School Committees, Inc.

CIVIL ACTION commenced in the Superior Court Department on February 29, 1980.

The case was heard by *Paul G. Garrity*, J., on a motion for summary judgment.

The Supreme Judicial Court granted a request for direct appellate review.

Brian T. Kenner (*Deborah S. Russo* with him) for the defendants.

Charles M. MacLean for the plaintiff.

Sandra C. Quinn, for Massachusetts Teachers Association, amicus curiae, submitted a brief.

Austin Broadhurst, for Massachusetts Association of School Committees, Inc., amicus curiae, submitted a brief.

Michael J. Long, for Massachusetts Association of School Superintendents, Inc., amicus curiae, submitted a brief.

Judith S. Yogman & E. Michael Sloman, Assistant Attorneys General, for the Attorney General, amicus curiae, submitted a brief.

NOLAN, J. The plaintiff, William J. Martin, was suspended from his teaching position in the Natick public schools on two separate occasions during the 1979-1980 school year. The superintendent of schools for Natick (superintendent) notified Martin of the first suspension, which covered a five-day period. After a hearing, the school committee of Natick (committee) voted to suspend Martin for an additional thirty days. Martin subsequently filed suit against the members of the committee and the superintendent in the Superior Court. He sought declaratory relief with respect to both suspensions, alleging that the defendants had imposed the suspensions in violation of G. L. c. 71, § 42D, and that he had been deprived of due process. The superintendent and the committee moved for summary judgment. After a hearing, the Superior Court judge ruled in favor of the defendants with respect to the thirty-day suspension, ruling that the statutory procedural requirements had been satisfied and that evidence supported the committee's decision. With respect to the five-day suspension, however, the judge

ruled in favor of the plaintiff.[2] The judge held unconstitutional the provisions of G. L. c. 71, § 42D, which permit certain school officials to suspend a teacher for up to five days without complying with the procedures mandated for longer suspensions.[3] The defendants' motion for reconsideration was denied, and final judgment was entered. Each party appealed and we granted the defendants' application for direct appellate review. G. L. c. 211A, § 10 (A).

On appeal, the defendants contend that the judge erred in declaring unconstitutional that part of G. L. c. 71, § 42D, which permits a superintendent to suspend a teacher for not more than five days. On cross-appeal, the plaintiff argues that the judge erred in ruling that the thirty-day suspension was imposed in accordance with the requirements of G. L. c. 71, § 42D, and of due process. We conclude that the judge correctly ruled that the thirty-day suspension was valid, but erred in ruling that the portion of the statute concerning a suspension for five days or less is unconstitutional.

The relevant facts may be summarized as taken from the judge's rulings, orders, and memorandum. Martin, accompanied by counsel, met with the superintendent on January 18, 1980. The superintendent informed Martin that he would not be teaching that day, and requested Martin's resignation. On January 21, 1980, the superintendent again met with Martin and his attorney. At this meeting, the superintendent told Martin that he had been suspended for five days. On the same day, the superintendent sent Martin a letter notifying him of the five-day suspension. Martin requested a hearing on this suspen-

[2] The judge used the procedural format of an order for partial summary judgment for the defendants regarding the thirty-day suspension, and partial summary judgment for the plaintiff as to the five-day suspension. See Mass. R. Civ. P. 56, 365 Mass. 824 (1974).

[3] The relevant portion of G. L. c. 71, § 42D, as amended through St. 1975, c. 316, provides: "The school committee, a superintendent or any other school official designated for the purpose, by the superintendent, may, notwithstanding any provision of this section to the contrary, suspend for a period of not more than five days a teacher for unbecoming conduct or for any other cause which such committee, superintendent or official deems adequate."

sion. In a second letter dated January 21, 1980, the superintendent notified Martin that the committee intended to vote on his suspension "for unbecoming conduct or other good cause" at its meeting scheduled for January 29, 1980, at 7:30 P.M. Martin's attorney wrote to the committee, seeking details of its claims against Martin.

On January 24, 1980, the superintendent wrote to Martin and his counsel, informing Martin that at its January 29 meeting the committee intended to vote on "whether to suspend" him. This letter delineated the allegations against Martin: that Martin had deliberately graded students lower than their school performances warranted after the first school term in order to motivate them, and that evaluations of Martin's teaching during the 1977-1978, 1978-1979, and 1979-1980 school years reflected his inefficiency and incapacity as a teacher. Martin's counsel wrote to the superintendent and the committee on January 25, 1980, asking whether the committee was considering a second suspension, and seeking information about the hearing format and the evidence against Martin. On the same day, the superintendent informed Martin's attorney that Martin would be on "paid leave of absence" for January 28 and 29, 1980.

The committee hearing began at 8 P.M. on January 29. The committee heard testimony and admitted in evidence exhibits concerning the allegations against Martin, then adjourned at 11:45 P.M. The hearing resumed on the next evening at 7:10 P.M. At approximately 1 A.M. the plaintiff's counsel informed the chairman that he was too tired to continue. The committee voted to go on with the hearing. Martin and his counsel left the meeting at 1:03 A.M. The committee then examined another witness and reexamined the superintendent. Counsel for the committee made a closing statement. After voting that each charge against Martin had been substantiated, the committee voted to suspend Martin through February 29, 1980, pursuant to G. L. c. 71, § 42D.

1. *The Five-Day Suspension.*

The defendants argue that the judge erroneously ruled that the last paragraph of G. L. c. 71, § 42D, which permits summary suspension of a teacher for not more than five days, is

unconstitutional. They contend that Martin did not have a recognizable property interest with respect to the five-day period of his suspension under this portion of § 42D. We agree that no property interest was implicated, and rule that this portion of G. L. c. 71, § 42D, is constitutional as applied in this case.

The nature of Martin's rights under State law governs our inquiry into the existence of a constitutionally protected property interest. *Milne* v. *School Comm. of Manchester*, 381 Mass. 581, 583 (1980), citing *Bishop* v. *Wood*, 426 U.S. 341, 344 (1976). It is without dispute that Martin was a tenured teacher. He was, therefore, entitled to the protection that State law affords to those who have attained that status. See generally G. L. c. 71, §§ 41 and 42. Section 42D clearly provides that a teacher may be suspended for up to five days by "[t]he school committee, a superintendent or any other school official designated for the purpose, by the superintendent . . . for unbecoming conduct or for any other cause which such committee, superintendent or official deems adequate." The statute specifically distinguishes the short term suspension from one for which a teacher must be given prior notice and an opportunity to be heard.[4] Questions implicating the adequacy of reasons and the need for disclosure of those reasons under this portion of § 42D must await another day because, in the instant case, Martin was given a hearing after his five-day suspension. The reasons for the thirty-day suspension are a matter of record and there is nothing in the record to indicate that the reasons for the five-day suspension were any different.

Martin claims that his status as a tenured teacher establishes a property interest "in continued employment, safeguarded by due process" and that due process must be provided with respect to any suspension or dismissal. In *Milne* v. *School Comm. of Manchester, supra*, the plaintiff argued that his status as a tenured teacher gave him a property interest in continued em-

[4]The short, summary suspension is permissible "notwithstanding any provision of [§ 42D] to the contrary." G. L. c. 71, § 42D (describing notice and hearing requirements relative to suspension of tenured teacher for "unbecoming conduct or other good cause" for a period not to exceed one month).

ployment and that he was entitled to notice and a hearing before his employment was terminated due to declining enrollment. *Id.* at 582-583. We held that the plaintiff had no legitimate claim of entitlement to continued employment in that case because the applicable statute set forth the right of a school committee to dismiss a tenured teacher due to a decrease in enrollment. *Id.* at 583. In *Boston Teachers Union, Local 66* v. *School Comm. of Boston*, 386 Mass. 197 (1982), we relied upon *Milne* in deciding that § 42 does not require that a tenured teacher be given notice and a hearing when that teacher is dismissed due to budgetary considerations. We conclude that Martin had no statutory right or legitimate claim of entitlement to continued employment which made him immune from the type of short term suspension described in § 42D.[5] Therefore, we reverse the judge's ruling that that portion of § 42D is unconstitutional and declare it constitutional as applied in this case.

2. *The Thirty-Day Suspension.*

Martin argues that he did not receive proper notice concerning the proposed thirty-day suspension, and that the committee's refusal to adjourn the hearing upon his request was arbitrary and capricious and deprived him of his due process rights. He also contends that the thirty-day suspension was improper

[5]Martin has attempted to distinguish our decision in the *Milne* case, contending that his rights as a tenured teacher were originally established as set forth in St. 1914, c. 714, § 5. He reasons that because this statute permitted dismissals due to declining enrollment without a hearing, the *Milne* court was not required to decide whether the Legislature could limit tenure rights after their original grant. Martin notes that the original tenure statute permitted suspension only for "unbecoming conduct and immoral acts," and concludes that the Legislature's modification of this statute to include the five-day suspension possible under § 42D was unconstitutional. Martin cites *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), to support this argument, but his reliance upon *Logan* is misplaced. The *Logan* Court stated that a State may not "constitutionally authorize the deprivation of [a property interest], once conferred, without appropriate procedural safeguards." *Id.* at 432, quoting *Vitek* v. *Jones*, 445 U.S. 480, 490 n.6 (1980). The Court recognized, however, that a State remains free to alter or to terminate a previously created property right. *Logan* v. *Zimmerman Brush Co.*, *supra* at 432. "In each case, the legislative determination provides all the process that is due . . . ." *Id.* at 433.

because the evidence presented to the committee did not substantiate the charges against him. We conclude that the committee imposed the suspension in accordance with both the statutory procedures and the requirements of due process. Furthermore, the record supports a finding that the charges were substantiated.

Section 42D provides that a tenured teacher "shall not be suspended, under the provision of this paragraph, except for unbecoming conduct or other good cause, nor unless at least seven days exclusive of customary vacation periods, prior to the meeting at which the vote is to be taken, he shall have been notified of such intended vote . . . nor unless the charges have been substantiated." The judge expressly ruled, as a matter of law, that Martin received proper notice of the committee's intention to vote on whether he should receive an *additional* suspension. We find no error in this ruling. Martin's claim that he should have been informed of the length of an additional suspension is meritless. The statute does not require the committee to decide on the length of a suspension prior to hearing evidence of the charges against a teacher. It would offend logic to require the committee to make this decision prior to consideration of relevant evidence and to limit unnecessarily the committee's actions at such a hearing to voting on suspension for a predetermined number of days.

With respect to the committee's refusal to grant a continuance on the second night of its hearing, we find no error in the judge's ruling that this decision was not arbitrary or capricious. The question of a continuance is addressed to the discretion of the tribunal. There was no abuse of discretion here. See *Daley* v. *District Court of W. Hampden*, 304 Mass. 86, 95 (1939).

Martin states that the judge reviewed evidence that had not been presented to the committee at the hearing. He asserts that the judge could not properly have ruled that the charges were substantiated. We do not determine the issues which bear on the evidence because we do not have a transcript of the hearing before the school committee except for a few unhelpful excerpts in the appendix. See Mass. R. A. P. 8 (b) (1), as amended,

378 Mass. 932 (1979). Apparently, the judge had the benefit of a transcript, and he concluded that there was sufficient evidence to support the thirty-day suspension. We shall not disturb this conclusion.

"[T]he authority of a school committee to manage the public schools is to be broadly interpreted." *O'Donnell* v. *Norwood*, 346 Mass. 394, 396-397 (1963). Martin's thirty-day suspension did not rest on a basis which was "arbitrary, irrational, unreasonable, in bad faith, or irrelevant to the committee's task of running a sound school system." *Springgate* v. *School Comm. of Mattapoisett*, 11 Mass. App. Ct. 304, 308 (1981).

The judgment of the Superior Court is reversed in so far as it was granted in favor of the plaintiff with respect to the five-day suspension. Judgment for the defendants is to be entered. The judgment in favor of the defendants with respect to the thirty-day suspension is affirmed.

So ordered.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS

SUPERIOR COURT
CIVIL ACTION
NO. 80-1075

WILLIAM J. MARTIN,
Plaintiff
v.
DIGHT W. CRAIN, et al.,
Defendants

RULINGS, ORDERS AND MEMORANDUM OF DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Statement of the Case

Plaintiff William J. Martin is a school teacher claiming that defendant Natick School Committee wrongly suspended him from employment for two consecutive periods during January and February, 1980. Plaintiff seeks a declaratory judgment to the effect that he was denied proper notice and hearing in accordance with G.L. c. 71, § 42D, which governs suspension of public school teachers. Defendant School Committee has moved for summary judgment on the ground that there exists no genuine dispute as to any material facts relevant to its compliance with G.L. c. 71, § 42D.

Facts

The submissions of the parties, including affidavits, set out the following uncontroverted facts relevant and material to Defendants' Motion. On January 18, 1980, plaintiff, accompanied by counsel, met with Natick School Superintendent

Keefe. Keefe informed plaintiff that he, plaintiff, would not be teaching that day and requested that plaintiff resign his teaching position [Martin affidavit, par. 10; Keough affidavit, par. 3]. On January 21, 1980, plaintiff, again accompanied by counsel, was informed by Keefe that he had been suspended for five days. Plaintiff received a letter to that effect on the same day. [Wright affidavit, par. 3; Martin affidavit, par. 13; Exhibit "1" attached to plaintiff's Memorandum in Opposition to the Defendants' Motion for Summary Judgment]. Plaintiff then requested a hearing on the five day suspension [Martin affidavit, par. 14; Wright affidavit, par. 4]. On January 21, 1980, Keefe informed plaintiff in a letter that "Pursuant to . . . General Law chapter 71, section 42D, and in my capacity as Superintendent of Schools, I hereby notify you that at its meeting scheduled for 7:30 p.m . . . the School Committee intends to vote on your suspension for unbecoming conduct or other good cause." [Exhibit "2" attached to plaintiff's Memorandum]. Plaintiff's counsel interpreted this letter to mean that a hearing on the five-day suspension had been scheduled for January 29. [Wright affidavit, par. 4].

On January 21, 1980, plaintiff's counsel wrote to the School Committee requesting details concerning its claims against plaintiff. [Exhibit "A" attached to Keough affidavit]. On January 24, 1980, Keefe informed plaintiff and plaintiff's counsel in writing that,

> ". . . I hereby notify you that at its meeting on January 29, 1980, the School Committee intends to vote on whether to suspend you for unbecoming conduct and/or other good cause. More specifically, the Committee intends to vote on *whether to suspend* you for alleged: 1) Deliberately grading your students lower for the grades which were given for the first term in order to "motivate" the class to work harder; 2) Inefficiency in your teaching

> reflected in evaluations conducted during the 1977-78, 1978-79 and 1979-80 school years . . . 3) Incapacity as a teacher as reflected in evaluations conducted in 1977-78, 1978-79 and 1979-80. . . . With respect to Mr. Keough's letter on January 21, 1980 concerning whether the meeting will be in open session, please be advised that, pursuant to . . . General Laws chapter 71, section 2D, the Committee will decide in its discretion whether the meeting is either public or private. Finally, please be advised that . . . chapter 71, section 42D requires a hearing only if so requested." [Exhibit "B" attached to Keough affidavit. Emphasis added].

Plaintiff's counsel interpreted the January 24, 1980 letter to be a communication of reasons why plaintiff had been suspended for five days [Keough affidavit, par. 6].

On January 25, 1980, plaintiff's counsel wrote to the School Committee and to Dr. Keefe requesting that the School Committee advise him as to whether it was considering a second suspension of plaintiff; what would be the hearing format; and, in addition, requested opportunity to examine all evidence to be offered at the hearing against plaintiff [Exhibit "C" attached to Keough affidavit]. Plaintiff's counsel requested Keefe to inform him of the source of the accusations set out in the January 24, 1980, letter and of plaintiff's employment status as of January 28, 1980 [Exhibit "D" attached to Keough affidavit]. On January 25, 1980, Keefe informed plaintiff's counsel that plaintiff would be on "paid leave of absence" for January 28 and 29, 1980 [Exhibit "E" attached to Keough affidavit].

On January 29, 1980, the School Committee conducted a hearing between 8:00 p.m. and 11:45 p.m. concerning the proposed plaintiff's suspension. [Hearing transcript, herein "T.", cover page, 130]. Witnesses called on behalf of the school

committee were examined under oath and then cross-examined by plaintiff's counsel. Exhibits were also introduced into evidence.

On January 30 the hearing resumed at 7:10 p.m. and continued at 1:40 a.m. on January 31 [January 30-31 "T.", cover page, 353]. Additional exhibits were introduced at that continued hearing. Three witnesses testified on behalf of the School Committee, one of whom was cross-examined by plaintiff's counsel ["T." 133]. At approximately 1:00 a.m. on January 31, 1980, plaintiff's counsel stated to the School Committee:

> "I am too tired, sir, for the record, too tired to go beyond one o'clock. Not effective in representing my client because of fatigue. If the Chairman wishes to adjourn the hearing, that is his prerogative; if he wishes to continue in my absence — I am going to advise my client not to continue with the hearing without counsel." ["T." 331].

The Chairman of the School Committee then asked whether the Committee desired to continue the hearing or to adjourn. The Committee voted unanimously to continue the hearing, ["T." 331-332], and at 1:03 a.m. plaintiff and his counsel left. ["T." 332]. After counsel and plaintiff's departure, counsel for the School Committee examined another witness, re-examined Keefe who had testified previously and then made a closing statement. ["T." 332-338]. The Committee then voted that each claim against plaintiff had been substantiated and next voted to suspend plaintiff through February 29, 1980, for "unbecoming conduct" and "other good cause" within the meaning of G.L. c. 71, § 42D. ["T." 344-350].

Rulings and Memorandum of Decision

The issues raised by defendant's Motion include whether there is a genuine issue of material fact as to whether the School Committee complied with the statutory seven-day notice which must precede a vote to suspend a teacher for more than five days; whether the Fourteenth Amendment of the United States Constitution invalidates the second paragraph of G.L. c. 71, § 42D, which provides that a tenured teacher may be suspended for five days without pay involuntarily and without a hearing at the discretion of a school officer; whether a teacher may be placed involuntarily on a paid leave of absence pursuant to G.L. c. 71, § 41A; whether when a school committee votes to continue a suspension hearing at 1:00 a.m. over the objection of fatigued counsel, and when counsel leaves the hearing with his client prior to the hearing's conclusion, does that vote amount to arbitrary and capricious action so as to deprive plaintiff of a fair hearing; and does the record in the case substantiate the School Committee's allegations against plaintiff?

In my opinion, in sum, the defendant School Committee satisfied, as a matter of law, the seven-day notice requirement preceding its vote to suspend plaintiff for thirty days. Further, I rule that the second paragraph of c. 71, § 42D, does violate the due process clause of the Fourteenth Amendment and is invalid; and thus, plaintiff, as a tenured state employee, was therefore deprived of a property right without due process of law. I also rule that plaintiff was placed on involuntary paid leave of absence in contravention of G. L. c. 71, § 41A. Next, I rule that the School Committee's vote to continue the May 29th suspension hearing at 1:00 a.m. was not arbitrary or capricious and plaintiff was not prejudiced thereby. Finally, I rule that the record in this action is sufficient to substantiate plaintiff's suspension for thirty days.

General Laws c. 71, § 42D, provides procedural rights for tenured teachers as follows:

> In every such town, a teacher employed at discretion under section forty-one . . . shall not be suspended, under the provisions of this paragraph, except for unbecoming conduct or other good cause, nor unless at least seven days exclusive of customary vacation periods, prior to the meeting at which the vote is to be taken, he shall have been notified of such intended vote; nor unless, if he so requests, he shall have been furnished by the committee with a written charge or charges of the cause or causes for which the suspension is proposed; nor unless, if he so requests, he has been given a hearing before the school committee which may be either public or private at the discretion of the school committee and at which he may be represented by counsel, present evidence and call witnesses to testify in his behalf and to examine them and to cross-examine other witnesses; nor unless the charge or charges have been substantiated; nor unless, in the case of a teacher, the Superintendent shall have given the committee his recommendations thereon. No teacher . . . shall be suspended for a period exceeding one month, nor shall such teacher . . . receive compensation for any period of unlawful suspension. . . .

General Laws c. 71, § 42D.

The second paragraph of c. 71, § 42D, empowers school officials to suspend tenured teachers for up to five days for any cause which the official deems adequate.

> The school committee, a superintendent or any other school official designated for the purpose, by the superintendent, may, notwithstanding any provision of this sec-

> tion to the contrary, suspend for a period of not more than five days a teacher for unbecoming conduct or for any other cause which such committee, superintendent, or official deems inadequate.

Id.

The Notice Issue

It is undisputed that on January 21, 1980, plaintiff received notice of a January 29, 1980 School Committee vote "[p]ursuant to the provisions of General Law chapter 71, Section 42D . . . [concerning plaintiff's] suspension for unbecoming conduct/or other good cause." [Exhibit "2" attached to plaintiff's Memorandum]. Counsel's assertion that the January 21, 1980 notice should have stated that the Committee intended to vote a thirty-day suspension in order to satisfy the statutory notice requirement is not well taken. The statute specifically contemplates suspensions lasting less than the maximum thirty days. "No teacher . . . shall be suspended *for a period exceeding one month* . . ." Id. [Emphasis added]. It would be illogical to require a school committee to predetermine the intended suspension period prior to hearing and vote on the matter.

Likewise, counsel's apparent confusion as to whether or not the January 21, 1980 notice letter applied to a hearing on the previous five-day suspension does not invalidate the notice. The January 21, 1980 letter cited c. 71, § 42D, specifically and referred to "your suspension for unbecoming conduct/or other good cause." Review of c. 71, § 42D, makes it clear that the notice and good cause requirements refer exclusively to suspensions exceeding five days. Plaintiff, as a matter of law, had notice as of January 21, 1980 that the School Committee intended to vote on his additional suspension on January 29, 1980.

The Constitutional Issue

The second paragraph of c. 71, § 42D, provides that a tenured teacher may be suspended summarily for five days without pay and without a hearing at the discretion of the appropriate school official. *Id.* See also Acts of 1968 and 1975, chapters 156 and 316 respectively, which amended the second paragraph. Chapter 156 was entitled "An Act Decreasing The Period For Which A Teacher May Be Suspended *Without A Hearing*." Chapter 316 was "An Act Limiting The *Summary Suspension* of Public School Teachers." [Emphasis added].

Defendant does not dispute that plaintiff is a tenured teacher employed with the Natick School System since 1959. [Complaint, par. 1]. It is undisputed that plaintiff requested a hearing concerning his five-day suspension. [Answer of Defendants, par. 7; Plaintiff Exhibit "C" attached to Keough affidavit; T-16 lines 6-12]. Defendant does not assert that plaintiff ever received a hearing on the five-day suspension, and it is clear he did not.

The issue is whether the School Committee acted constitutionally in summarily suspending a plaintiff for five days without a hearing pursuant to the second paragraph of chapter 71, section 42D. This court rules that the second paragraph is unconstitutional to the extent that it empowers school officials to suspend tenured teachers without notice or a post-suspension hearing.

In *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), the United States Supreme Court debated the issue as to the source of procedural rights accorded to federal workers who, by statute, enjoyed a property interest in their jobs. In that case, plaintiff was a non-probationary federal employee who challenged as unconstitutional a federal statute and regulations permitting his termination prior to any hearing. The regulations allowed

for a post-termination hearing with a right of appeal. *Id.* at 143-146. The Court upheld the post-termination hearing procedure but was divided as to whether the post-termination regulations were constitutional. Justice Rehnquist wrote a plurality opinion joined by the Chief Justice and Justice Stewart in which he theorized that the statute which creates tenure and thus a property interest on behalf of the employee governs also the process due the employee when that interest is taken away.

> Here appellee did have a statutory expectancy that he not be removed other than for 'such cause as will promote the efficiency of [the] service'. But the very section of the statute which granted him that right . . . expressly provided also for the procedure by which 'cause' was to be determined, and expressly omitted the procedural guarantees which appellee insists are mandated by the Constitution.
>
> [W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet.

Id. at 151-154. The Rehnquist analysis would uphold the five-day discretionary suspension without a hearing, because it is "inextricably intertwined" with the grant of the substantive right confining suspensions exceeding five days to a good cause standard.

The majority of the Justices disagreed, however, that a procedural statute conferring job tenure is determinative also of what process is due. The majority followed the principle that the Constitution is the source of procedural rights. Justices Powell and Blackmun concurred with the plurality, but only

because they found that the statute granting post-termination procedural rights survived constitutional scrutiny. Once a property right to job security was established, the Constitution determines what process is due.

> The plurality opinion evidently reasons that the nature of appellee's interest in continued federal employment is necessarily defined and limited by the statutory procedures for discharge and that the constitutional guarantee of procedural due process accords to appellee no procedural protections against arbitrary or erroneous discharge other than those expressly provided in the statute. The plurality would thus conclude that the statute governing federal employment determines not only the nature of appellee's property interest, but also the extent of the procedural protections to which he may lay claim. . . . This view misconceives the origin of the right to procedural due process. That right is conferred, not by legislative grace, but by constitutional guarantee.

Id. at 166-167.

Justice White wrote in dissent that, "The rationale of [the plurality] position quickly leads to the conclusion that even though the statute requires cause for discharge, the requisites of due process could equally have been satisfied had the law dispense with any hearing at all. . . ." *Id.* at 177-178. Justices Brennan and Douglas joined Justice Marshall in dissent who wrote:

> [A]lthough appellee's property interest arose from statute, the deprivation of his claim of entitlement to continued employment would have to meet minimum standards of procedural due process regardless of the discharge procedures provided by the statute. Accordingly, a major-

> ity of the court rejects Mr. Justice Rehnquist's argument that because appellee's entitlement arose from statute, it would be conditioned on a statutory limitation of procedural due process protection.

Id. at 211.

The second paragraph of chapter 71, section 42D, therefore cannot be deemed constitutionally adequate merely because it is coupled with procedural rights in the first paragraph. A court must look to the federal constitution to determine whether a tenured public school teacher may be suspended summarily for five days without pay and without a hearing.

Applicable cases provide the rule that procedural due process requires a minimum a post-deprivation hearing where government suspends temporarily a vested interest. In *Goss* v. *Lopez*, 419 U.S. 565 (1975), the United States Supreme Court declared unconstitutional a statute permitting summary suspension of students without some form of post-suspension hearing.

> We do not believe that school authorities must be totally free from notice and hearing requirements if their schools are to operate with acceptable efficiency. Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.
>
> We agree with the District Court, however, that there are recurring situations in which prior notice and hearing cannot be insisted upon. Students whose presence poses a

> continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from the school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable. . . .
>
> The District Court found each of the suspensions involved here to have occurred without a hearing, either before or after the suspension, and that each suspension was, therefore, invalid and the statute unconstitutional insofar as it permits such suspensions without notice or hearing. Accordingly, the judgment is Affirmed.

Id. at 581-584.

In *Peacock* v. *Bd. of Regents of the Universities and State Colleges of Arizona*, 510 F.2d 1324 (9th Cir.) (1975), cert. den., 422 U.S. 1049 (1975), the Appeals Court upheld the suspension of a tenured university professor where the professor was accorded a post-suspension hearing. "Whatever damage appellant will suffer by a suspension is minimized by the requirement of a prompt post-suspension hearing, which limits the duration of the suspension and the extent of the damage he will suffer should the suspension later be found to have been unwarranted." *Id.* at 1329. In *O'Hara* v. *Commissioner of Public Safety*, 367 Mass. 376 (1975), the Supreme Judicial Court held that a state police officer's due process rights were not violated where his suspension was "followed by prompt notice and full hearing." *Id.* at 384. Compare *Wood* v. *Goodman*, 381 F.Supp. 413 (D. Mass. 1974) aff'd without op., 516 F.2d 894 (1st Cir. 1975), where the court declined to rule on the constitutionality of the second paragraph of G.L. c. 71, § 42D, because the plaintiff school teacher had received a hearing prior to his seven-day suspension then prescribed by the paragraph.

> Since the procedural safeguards accorded the plaintiff in this case met all the requirements of due process, it is unnecessary to enter a declaration, as requested by the plaintiff, concerning whether a suspension under the second paragraph of M.G.L. c. 71, § 42D, may, consistently with due process, occur without the procedural safeguards given the plaintiff in this case.

Id. at 420.

This court rules in sum that the January 21-25, 1980 suspension of plaintiff was invalid because it lacked the minimum procedural safeguards required by the federal constitution and that the second paragraph of c. 71, § 42D, to the extent that it allows five-day suspensions of tenured teachers without a prompt post-suspension hearing, is unconstitutional.

Proper Remedy is Five Days Back Pay

An order requiring a hearing regarding the five-day suspension would not satisfy plaintiff's constitutional right to prompt post-suspension hearing. See, e.g., *Brown* v. *Bathke*, 566 F.2d 588 (8th Cir. 1977) (high school probationary teacher's right to due process not adequately protected by post-terminated hearing conducted some two years after her termination). The proper remedy, therefore, is back pay for the five days plaintiff was wrongfully suspended. *Johnson* v. *San Jacinto Junior College*, 498 F.Supp. 555, 571 (S.D. Tex. 1980). "The back pay relief to which plaintiff is entitled for denial of procedural due process consists of lost wages including the value of any employment benefits lost as a result of the unlawful demotion; less any actual subsequent earnings of plaintiff in regular daytime employment during that period." Plaintiff should submit to this court and to defendant an affidavit setting out his lost wages/ benefits for the week of January 21-25, 1980 as well as

any alternative salary he may have received in accordance with the *Johnson* criteria. *Id.* Any dispute which may arise regarding plaintiff's salary/benefits claim for that week may be entertained in a motion to reconsider this specific order.

Paid Leave of Absence Improperly Imposed

The record reveals and defendants does not dispute its unilateral imposition upon plaintiff of a paid leave of absence on January 28 and 29. ["T." 81-82]. That action manifestly contravenes G.L. c. 71, § 42D, which provides in pertinent part:

> A school committee may grant a leave of absence for study or research to any teacher . . . serving at discretion which would increase his professional ability . . . provided, that prior to the granting of such level he shall enter into a written agreement with the school committee.

G.L. c. 71, § 41A.

This court finds the involuntary imposition of paid leave of absence to be unlawful. Plaintiff alleges no damages, however, as a result of that imposition, and therefore none are granted.

Thirty-Day Suspension Hearing Complied With First Paragraph of G.L. c. 71, § 42D; The Hearing Satisfied Due Process; and The School Committee Did Not Act in An Arbitrary or Unreasonable Manner.

The hearing transcript reveals that plaintiff, through counsel, had ample opportunity to present evidence, and to examine and cross-examine witnesses, in compliance with the first paragraph of c. 71, § 42D. That paragraph, moreover, is constitutional because it provides for notice and a hearing *prior* to

suspension. Cf. *Goss, Goodman, O'Hara, Peacock, supra.* The School Committee did not act in an unreasonable or capricious manner in continuing the January 30-31 hearing over plaintiff counsel's objections. See *Wood* at 418 (par. 27), "Plaintiff and his attorney left the May 7, 1970 meeting before adjournment." See also *White* v. *S. Park Independent School District,* 693 F.2d 1163 (5th Cir. 1982) (No violation of due process in refusing to grant second continuances of termination hearing and in deciding to proceed in teacher's absence).

Record Provides Ample Evidence to Substantiate Thirty-Day Suspension

This court finds sufficient grounds in the hearing transcript upon which the school committee could lawfully suspend plaintiff for thirty days. This court is guided by definition of "good cause" found in Massachusetts cases dealing with teacher terminations under G.L. c. 71, § 42. "The term 'good cause' has been held to include 'any ground which is put forward by the committee in good faith and which is not arbitrary, irrational, unreasonable or irrelevant to the committee's task of building up and maintaining an efficient school system'" *Nutter* v. *School Committee of Lowell,* 1977 Mass. App. Ct. 77, 81; *Lower* v. *North Middlesex Regional School Committee,* 1979 Mass. App. Ct. 536, 539. In so holding, this court notes hearing testimony regarding parental concern with plaintiff's classroom learning environment ["T." 36-38, 189-190] disciplinary problems and lack of challenge in the classroom ["T." 38, 105, 140, 142]; lack of formal assessment of student progress ["T." 107, 108]; inadequate lesson plans ["T." 158]; and deliberate lowering of academic grades in order to motivate pupils ("T." 196, 197, 198, 202, 274] as among the evidence sufficient to substantiate the school committee's decision.

Orders for Judgment

Partial summary judgment is allowed defendant to the extent that it acted lawfully regarding the thirty-day suspension of defendant. Partial summary judgment is allowed plaintiff to the extent that he was suspended wrongfully from January 21 through January 25, 1980. The parties may submit affidavits to this court regarding damages in accordance with this decision.

/s/ _____
Paul G. Garrity
Justice of the Superior Court

Entered: June 12, 1983

COMMONWEALTH OF MASSACHUSETTS
SCHOOL COMMITTEE HEARING
NATICK, MASSACHUSETTS

PRESENT:

DIGHT W. CRAIN, CHAIRMAN
PETER H. GARLAND
J. VINCENT SAUNDERS
MARSHALL LEBOWITZ
MARK H. RAIDER
PAUL AMBLER
PAMELA J. KAUFMANN

ALSO PRESENT:

JOSEPH A. KEEFE, SUPERINTENDENT
FRANCIS CORCORAN, ASST. SUPERINTENDENT FOR PERSONNEL

WILLIAM MARTIN, TEACHER

APPEARANCES:

Atty. Phillips Axten (Nutter, McClennen & Fish) 600 Atlantic Avenue, Boston, Massachusetts 02210, appearing for the Superintendent

Atty. William Wright, Atty. Joseph Papetti and Atty. Paul J. Keough, 5 Main Street, Natick, Massachusetts, appearing for William Martin

Town Hall
Natick, Massachusetts
January 29, 1980
8:00 p.m.

A TRUE COPY
ATTEST: /s/ _____ March 5, 1985
Frederick J. Quinlan, Asst. Clerk
Supreme Judicial Court for the Commonwealth

. . . . . .

I think it is important to emphasize that under the second paragraph, Chapter 71, Section 42D, a Superintendent may, notwithstanding any provision of this section to the contrary, suspend for a period of not more than five days a teacher for unbecoming conduct or for any other cause which such Superintendent deems adequate.

As a result, Mr. Chairman, I would suggest that the statute, itself, is very clear, made even clearer by communications from the Superintendent of Schools that the meeting tonight was for the intention of voting on whether to suspend Mr. Martin henceforth. It does not have any reference, in and of itself, to any action that the Superintendent has taken up to this point in time. As a result, Mr. Chairman, I would appreciate the opportunity, when the School Committee is ready, to proceed with my first witness.

CHAIRMAN CRAIN: Mr. Wright, the School Committee has followed Chapter 71, Section 42D to the point of and including this hearing by law, and Mr. Axten will present witnesses to substantiate the charges, after which each witness you . . . .

. . . . . .

MR. WRIGHT: That, Mr. Crain, is what I am questioning, and it appears obvious to me, but maybe not to you or to the people here, there is one question that is asked there. Are we going to receive a hearing on the five-day suspension previously imposed? Is your answer to that question no?

CHAIRMAN CRAIN: Not tonight.

MR. WRIGHT: Well, then, if so when?

CHAIRMAN CRAIN: That will be determined by the School Committee at a later date.

MR. WRIGHT: Let the record indicate my objection. Notification given January 21, 1980, referred to the charges contained in the letter which accompanied a five-day suspension. The notification of this meeting to consider a second suspension was not given until the 24th, and the statute that you have just said you are following requires, sir, a seven-day notification as to that suspension.

CHAIRMAN CRAIN: That notice was hand-delivered on January 21.

MR. WRIGHT: Question as to law and a question as to which notice you refer to.

§ 42. Dismissal of teachers and superintendents

The school committee may dismiss any teacher, but no teacher and no superintendent, other than a union superintendent and the superintendent of schools in the city of Boston, shall be dismissed unless by a two thirds vote of the whole committee. A teacher not employed at discretion under the preceding section and who has been teaching for more than ninety days shall not be dismissed for any reason unless at least fifteen days, exclusive of customary vacation periods, prior to the meetings at which the vote is to be taken, he shall have been notified of such intended vote and, if he so requests, he shall have been furnished by the committee with a written statement of the cause or causes for which the dismissal is proposed and if he so requests, he has been given a hearing before the school committee at which he may be represented by counsel, present evidence and call witnesses to testify in his behalf and examine them, and the superintendent shall have given the committee his recommendation thereon. In every such town a teacher or superintendent employed at discretion under section forty-one or a superintendent employed under a contract, for the duration of his contract, shall not be dismissed, except for inefficiency, incapacity, conduct unbecoming a teacher or superintendent, insubordination or other good cause, nor unless at least thirty days, exclusive of customary vacation periods, prior to the meeting at which the vote is to be taken, he shall have been notified of such intended vote; nor unless, if he so requests, he shall have been furnished by the committee with a written charge or charges of the cause or causes for which his dismissal is proposed; nor unless, if he so requests, he has been given a hearing before the school committee which may be either public or private at the discretion of the school committee and at which he may be represented by counsel, present evidence and call witnesses to testify in his

behalf and examine them; nor unless the charge or charges shall have been substantiated; nor unless, in the case of a teacher, the superintendent shall have given the committee his recommendations thereon. The change of marital status of a female teacher or superintendent shall not be considered cause for dismissal under this section. Neither this nor the preceding section shall affect the right of a committee to dismiss a teacher whenever an actual decrease in the number of pupils in the schools of the town renders such action advisable. In case a decrease in the number of pupils in the schools of a town renders advisable the dismissal of one or more teachers, a teacher who is serving at the discretion of a school committee under section forty-one shall not be dismissed if there is a teacher not serving at discretion whose position the teacher serving at discretion is qualified to fill. No teacher or superintendent who has been lawfully dismissed shall receive compensation for services rendered thereafter.

§ 42D. Suspension of teachers and superintendents

The school committee may suspend any teacher, but no teacher shall be suspended for more than ten days and no superintendent, other than a union superintendent of schools in the city of Boston, shall be suspended, unless by a two thirds vote of the whole committee. In every such town a teacher or superintendent employed at discretion under section forty-one or a superintendent employed under a contract, for the duration of his contract, shall not be suspended, under the provisions of this paragraph, except for unbecoming conduct or other good cause, nor unless at least seven days exclusive of customary vacation periods, prior to the meeting at which the vote is to be taken, he shall have been notified of such intended vote; nor unless, if he so requests, he shall have been furnished by the committee with a written charge or charges of the cause or causes for which the suspension is proposed; nor unless, if he so requests, he has been given a hearing before the school committee which may be either public or private at the discretion of the school committee and at which he may be represented by counsel, present evidence and call witnesses to testify in his behalf and to examine them and to cross-examine other witnesses; nor unless the charge or charges shall have been substantiated; nor unless, in the case of a teacher, the superintendent shall have given the committee his recommendations thereon. No teacher or superintendent shall be suspended for a period exceeding one month, nor shall such teacher or superintendent receive compensation for any period of lawful suspension. No teacher or superintendent shall be interrogated prior to any notice given to him relative to a hearing on suspension unless he is notified of his right to be represented by counsel during any such investigation.

The school committee, a superintendent or any other school official designated for the purpose, by the superintendent, may,

notwithstanding any provision of this section to the contrary, suspend for a period of not more than five days a teacher for unbecoming conduct or for any other cause which such committee, superintendent or official deems adequate.

§ 43A. Appeal by teachers and certain supervisory personnel from dismissal, demotion or removal; determination and disposition; decision final

Any teacher or principal or superintendent of schools employed at discretion or any superintendent employed under a contract, for the duration of his contract, or any principal or supervisor, who had been dismissed, demoted, or removed from a position by vote of a school committee under the provisions of section forty-two, section forty-two A or section sixty-three may, within thirty days after such vote appeal therefrom to the superior court in the county in which the person was or is employed.

The court shall advance the appeal for a speedy hearing and, after such notice to the parties as it deems reasonable, it shall hear the cause de novo, review such action, and determine whether or not upon all the evidence such action was justifiable. If the court finds such action was justifiable, the action of the school committee shall be affirmed; otherwise, it shall be reversed and the appellant shall be reinstated to the position without loss of compensation. The decision of the court shall be final, except as to matters of law.

Office - Supreme Court, U.S.
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(2)

No. 84-1432

In The
Supreme Court of the United States
October Term, 1984

WILLIAM J. MARTIN,
Petitioner,

v.

DIGHT W. CRAIN, PETER H. GARLAND, J. VINCENT SAUNDERS, MARSHALL LEBOWITZ, MARK H. RAIDER, PAUL AMBLER, and PAMELA J. KAUFMAN, as they are members of the NATICK SCHOOL COMMITTEE and JOSEPH A. KEEFE, SUPERINTENDENT OF SCHOOLS OF THE TOWN OF NATICK,
Respondents.

ON PETITON FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

RESPONDENTS' BRIEF IN OPPOSITION

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April, 1985

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QUESTIONS PRESENTED

1. Whether the Supreme Judicial Court of the Commonwealth of Massachusetts correctly upheld as constitutional a state statute authorizing the suspension, without a hearing, of a public school teacher for five days or less for any reason which the appropriate school official deems adequate.

2. Whether the Supreme Judicial Court of the Commonwealth of Massachusetts correctly determined that petitioner's five day suspension should be upheld without reaching the facial constitutionality of the statute where the teacher and his attorney twice met with the school superintendent prior to the five day suspension and the teacher received a full evidentiary hearing promptly after the five day suspension.

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STATEMENT OF THE CASE

Respondents submit that the opinions of the Supreme Judicial Court (Pet. A. 3a-5a)[1] and the trial court (Pet. A. 10a-13a) contain accurate statements of the facts and proceedings necessary for consideration of the petition for a writ of certiorari.

Respondents do correct the misimpression potentially caused by petitioner's statement that during the presuspension meetings between petitioner, his counsel, and the school superintendent, no charges were advanced against petitioner regarding his performance as a teacher (Pet. at 3). The record reflects the following chronology of petitioner's presuspension notice and opportunity to respond. Petitioner had received increasingly poor evaluations since his return to teaching in 1977 from an extended leave of absence taken because of personal difficulties (Resp. A. 1-2). Concerns about petitioner's teaching competence and his handling of students were the subject of numerous meetings between petitioner and the school principal or superintendent. Petitioner received numerous written notices cataloguing his profound deficiencies as a teacher during the months preceding his suspension.[2] On January 14, 1980, a committee of parents demanded to speak with the superintendent, at which time

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[1]References to the appendix to the petition for a writ of certiorari appear as "Pet. A.". References to the appendix to respondents' brief in opposition appear as "Resp. A.".

[2]Various exhibits from the suspension hearing appear at Resp. A. 3-15. These memoranda reflect the ample notice and opportunity to respond provided petitioner. Each is either addressed to petitioner or signed by him, reflecting a discussion of the contents with his supervisor.

the parents' many concerns with petitioner's handling of their children's class were discussed (Resp. A. 16-17).[3] On January 18, 1980,[4] the superintendent met with petitioner and petitioner's attorney, informing them of the superintendent's opinion that conditions in petitioner's classroom had reached an intolerable level (Resp. A. 17). On January 21, 1980, the superintendent met again with petitioner and petitioner's attorney, again informing them that the classroom situation was intolerable (Resp. A. 18). The superintendent, at the January 21 meeting, told petitioner that he was being suspended for the five day period of January 21-25, 1980 (Pet. A. 4a).

On January 29, 1980, petitioner received a full evidentiary hearing before the school committee on the following matters: (a) petitioner's deliberate low grading of students as a motivating tool; (b) petitioner's inefficiency in teaching; and (c) petitioner's incapacity as a teacher (Pet. A. 5a, 11a-13a).[5]

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[3]Respondents' appendix contains excerpted sworn testimony of Superintendent Keefe at the suspension hearing.

[4]The superintendent, at the suspension hearing, placed this meeting on January 16, 1980. Whether this meeting occurred on January 16 or 18 is of no consequence.

[5]The dispute in the record whether this hearing was expressly related to the five day suspension or was limited to substantiating the "unbecoming conduct or other good cause" required for imposition of the subsequent thirty day suspension was decided against petitioner. The Supreme Judicial Court found that this hearing was an effective postsuspension hearing on the five day suspension (Pet. A. 6a). Telling on this point and supportive of the state court's finding on this factual issue is petitioner's affidavit, which states:

(Continued on next page)

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Determination By The Supreme Judicial Court That Under State Law No Property Interest Was Affected By The Five Day Suspension Is Dispositive Of Petitioner's Constitutional Claims.

The petition wrongly assumes that a property interest was affected by the five day suspension. Petitioner argues from that assumption the constitutional process he believes is due. His argument however, begs the critical question decided against him by the Supreme Judicial Court's holding that, "[N]o property interest was implicated" (Pet. A. 6a) and that petitioner "had no statutory right or legitimate claim of entitlement to continued employment which made him immune from the type of short term suspension described in § 42D." (Pet. A. 7a). Because the legislature authorized such suspensions for any reason deemed adequate by the superintendent, no property interest, under state law, is implicated. Because there was no deprivation of a property interest, constitutional due process considerations do not come into play. *Cleveland Board of Education v. Loudermill*, — U.S. —, 53 U.S. L.W. 4306, 4307 (U.S. March 19, 1985);[6] *Board of Regents*

(Continued from previous page)

> On January 24, 1980, I was notified in writing that the reason I had been suspended for five (5) days by [the superintendent] was due to my grading procedure, alleged inefficiency and incapacity as a teacher. (Resp. A. 19).

The Supreme Court found nothing contrary in the record "to indicate that the reasons [for the five day and thirty day suspension] were . . . different." (Pet. A. 6a).

[6]This Court's recent decision in *Cleveland Board of Education v. Loudermill*, — U.S. —, 53 U.S.L.W. 4306 (U.S. March 19, 1985) explains, by contrast, the error in petitioner's conten-

(Continued on next page)

v. Roth, 408 U.S. 564, 576-578 (1972). The decision of Massachusetts' highest court on the construction of state law should not be disturbed. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Berea College v. Kentucky*, 211 U.S. 45, 53-54 (1908).

Property interests are not created by the Constitution, but are created and defined by an independent source such as state law. *Board of Regents v. Roth*, 408 U.S. at 577. This Court has consistently held that no constitutional due process issues arise when no property interest under state law is involved. *E.g., Bishop v. Wood*, 426 U.S. 341, 347 (1976); *Arnett v. Kennedy*, 416 U.S. 134, 178 (1974) (White, J.). The state court determination that this case involves "no legitimate claim of entitlement" disposes of, without reaching, petitioner's due process claims.

The construction of state law is left to the state courts. This Court's "only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977); *see also; Herb v.*

(Continued from previous page)

tions here. The Ohio termination statute at issue in *Loudermill* provided a specific, objective list of wrongs upon which termination could be based. *Id.* at 4307 n.4. The five day suspension statute at issue here provides for an extremely brief suspension for any reason deemed adequate by the superintendent. See *infra*, pp. 9-10. While the issue in *Loudermill* was what process is due to protect the employee's conceded property interest against termination of employment, the issue in this case is whether a property interest is involved at all by this brief suspension imposed on a subjective, discretionary basis.

Pitcairn, 324 U.S. 117, 125-126 (1945). The sufficiency of petitioner's claim that he had a legitimate expectation to employment undisturbed by a five day suspension for reasons deemed adequate by the superintendent must be decided by reference to state law and where, under state law, such brief suspensions may be imposed at the will and pleasure of the employer, no constitutional process is due. *Meachum v. Fano,* 427 U.S. 215, 228-229 (1976).

The decision of the Supreme Judicial Court that no property interest was divested by the five day suspension is fully supported by the language of the statutory scheme with respect to a teacher such as petitioner. Petitioner was subject to a suspension of not more than five days for unbecoming conduct or for *any other cause which the superintendent deemed adequate.* Mass. Gen. Laws Ann. ch. 71 § 42D (West 1982) (Pet. A. 32a). Because such a brief suspension may be imposed for any reason the superintendent subjectively deems adequate, the statute was properly construed by the state court as authorizing brief "at will" suspensions (Pet. A. 6a n.4). The correctness of the court's ruling is apparent upon comparison of the standard in the five day suspension statute with the legislative standards for longer suspensions and terminations. A teacher may be suspended for up to thirty days only for "unbecoming conduct or other good cause." Mass. Gen. Laws Ann. ch. 71 § 42D (West 1982). (Pet. A. 31a). A tenured teacher may be terminated only for "inefficiency, incapacity, conduct unbecoming a teacher . . ., insubordination or other good cause." Mass. Gen. Laws Ann. ch. 71 § 42 (West 1982 (Pet. A. 29a). The above comparison manifests the legislative intent which was given effect by the Supreme Judicial Court. Terminations or suspensions in excess

of five days are subject to objectively defined standards of conduct; decisions pursuant to those standards can be objectively and meaningfully reviewed. In contrast, a five day suspension may be imposed based on subjective, discretionary reasons deemed adequate by the superintendent; in this situation, no purpose would be served by third-party review. *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 467 (1981) (White, J.).

The Supreme Judicial Court correctly construed the legislative intent of Mass. Gen. Laws Ann. ch. 71 § 42D. A public school teacher has no legitimate expectation against being suspended for five days or less for reasons "deemed adequate" by the superintendent. This reasonable construction of state law, by the highest court of the state, should not be disturbed. This state law issue does not properly invoke the certiorari jurisdiction of this Court.

II. The Court Should Not Hear A Claim Of Entitlement To A Presuspension Hearing, Raised For The First Time In The Petition For Certiorari.

Petitioner's complaint contained no constitutional allegations concerning his five day suspension (Resp. A. 20-24). The trial court raised a constitutional issue concerning the five day suspension *sua sponte*, limiting its constitutional inquiry to the supposed absence of a postsuspension hearing (Pet. A. 22a).

On appeal, petitioner adopted the position raised *sua sponte* by the trial court, challenging the five day suspension solely on the basis of a claimed denial of a post-

suspension hearing.[7] Prior to the filing of his petition for certiorari, Martin never claimed that a presuspension hearing was required. The Supreme Judicial Court, deciding only those issues presented and argued, correctly found that petitioner received the only hearing he claimed was due—a full and effective postsuspension hearing. Having lost, on a facual basis, the only constitutional violation he argued below, petitioner and his most recent attorneys[8] produces in this Court a new theory, raising for the first time the extent of presuspension procedures provided him.

The petition violates the fundamental rule that this Court "cannot decide issues raised for the first time here." *Tacon v. Arizona*, 410 U.S. 351, 352 (1973). This bar is jurisdictional, not discretionary. *Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 334 (1968) (Harlan, J. dissent). The state court was neither asked to decide nor decided the claim raised in the petition.[9] When "the highest state court has failed to pass upon a federal ques-

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[7]The issue framed by Martin in the Supreme Judicial Court refers only to a postsuspension hearing. Additionally, Martin's brief in the Supreme Judicial Court concludes: "Hence, the suspension of Mr. Martin for five days without a postsuspension hearing was an unconstitutional deprivation of a property interest without due process of law."

[8]Petitioner has been represented by different counsel at every stage of these proceedings; the presuspension conferences, the postsuspension hearing, the Supreme Judicial Court and in this Court.

[9]Of course, the Supreme Judicial Court holding that the five day suspension does not implicate a property interest supports, *a priori*, the position that no presuspension hearing is required. See pp. 6-10, *supra*. Assuming *arguendo*, however, the implication of a property interest, petitioner's failure to raise presuspension hearing issues below is fatal to his petition.

tion, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969).

Having made no claim below of the type pressed here, petitioner is not properly before this Court.

III. The Court Should Not Review Whether, As A Matter Of Fact, Petitioner Received An Effective Postsuspension Hearing.

The Supreme Judicial Court held:

> Questions implicating the adequacy of reasons and the need for disclosure of those reasons under [the second paragraph] of § 42D must await another day, because, in the instant case, Martin was given a hearing [four days] after his five day suspension (Pet. A. 6a.)

Petitioner received a prompt and full evidentiary hearing, at which he was represented by counsel who cross-examined witnesses and had the opportunity to present whatever contrary evidence petitioner wanted the school committee to consider. This hearing fully supports the Supreme Judicial Court's alternative grounds for upholding the five day suspension. Martin argues that the Supreme Judicial Court "misreads the record" with respect to this hearing (Pet. at 11). Petitioner asks this Court to decide whether the facts adequately support the state court holding that he in fact received an effective postsuspension hearing.

Martin's claim of "misreading the record" is no more than a claim of factual error. Such claims are not and should not be reviewed by this Court. "We do not grant a certiorari to review evidence and discuss specific facts."

United States v. Johnston, 268 U.S. 220, 227 (1925). *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952). The finding of the Supreme Judicial Court that petitioner received a postsuspension hearing is inappropriate for review and is dispositive of the case. Petitioner offers no justification for his attempt to involve this Court in a review of facts decided against him below.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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April, 1985

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APPENDIX

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT

CIVIL ACTION NO. 80-3785

MIDDLESEX, SS.

WILLIAM J. MARTIN,
Plaintiff,

v.

JOSEPH A. KEEFE, et al.,
Defendants.

AFFIDAVIT OF JOSEPH A. KEEFE

I, Joseph A. Keefe depose and say the following:

1. I am currently the Superintendent of Schools in Natick and have been employed in that position since January 1, 1977. I hold Masters and Doctorate degrees in Education from Boston University. I have worked in the field of education since 1954 and have held administrative positions since 1959. I make this affidavit of my own personal knowledge.

• • •

8. In the school years 1977-78, 1978-79 and 1979-80 the principals of each elementary school completed evaluation forms for each teacher based on their classroom observations. The evaluations for 1977-78 were in the form of narrative reports and the evaluations for the subsequent two years used a performance rating scale. After the evaluations were completed, they were submitted for review to Mr. Francis Corcoran, Assistant Superintendent for Personnel.

9. Mr. Corcoran and I have read and reviewed Mr. Martin's 1977-78, 1978-79 and 1979-80 evaluations, as well as 150 evaluations of other tenured teachers during that time period. During the 1978-79 school year each teacher was evaluated on a scale ranging from unsatisfactory to outstanding. Of the approximately 150 evaluations of tenured teachers only 3 received ratings of "fair" (next to the lowest category) and none received overall evaluations of unsatisfactory. Mr. Martin was rated fair in March 1979. In 1979-80 the same scale was utilized. One teacher was rated unsatisfactory, none were rated fair, five were rated good, 75 were rated very good, and 43 were rated outstanding. In March 1980, Mr. Martin's performance was judged to be unsatisfactory.

• • •

SIGNED UNDER THE PENALTIES OF PERJURY THIS —— DAY OF OCTOBER, 1982.

_____

Joseph A. Keefe

EXHIBIT NO. 4

November 19, 1979

Re: Bill Martin

Bill Martin and I have met several times. During these meetings the following concerns were expressed:

1. Overall lack of classroom control and discipline.

2. On October 25, Mr. [.....]* met with me to share some of his concerns that he had about his son [.....], a student in Bills' class. Mr. [.....] indicated that [.....] did not want to go to school; that he was bored and not challenged or motivated. I shared these concerns with Bill the following day.

3. Ofter October 25 several observations in Bill's classroom were made after which I met with Bill and indicated to him that possibly the lack of classroom control and discipline was due to his not being organized or adequately prepared.

4. On November 7 a student from Bill's classroom was placed in Nancy Hurwitz's classroom by me because of behavior difficulties.

5. Nancy Hurwitz was informed that this particular student's classroom planning and preparation was Bill's responsibility. I told Bill that moving this student from his classroom was only temporary and that Bill was still responsible for planning and monitoring the student's progress. It was suggested that he would have to individualize for this student the same as he would ordinarily have to do for any student in his class that might require such preparation.

*[.....] material was omitted from the original.

Suggestions:

1. [.....]
2. Make sure work given is appropriate for the class as a whole, for small groups, and for individual students.
3. Participate actively in the lesson and activity whenever possible.
4. Try to have lesson move smoothly.
5. Include ready-made supportive materials in your plans.
6. Group and challenge exceptional students (related to #2 above).
7. Know the materials well before you teach each lesson.
8. Use a variety of instructional methods.
9. Establish activity and learning centers in the room.
10. Use appropriate control techniques for each particular student.

/s/ I feel I deal with *everyone* in a positive way, the best I am able.

Wm. J. Martin

EXHIBIT NO. 5

November 20, 1979

Re: Bill Martin

Bill Martin and I met on November 19. During this meeting the following concerns were expressed:

We discussed his lesson plans which he was asked to bring with him. The lesson plans at that time were found to be very inadequate. The explicit reasons for the lessons being inadequate were; they were not well-organized, no provisions were made for exceptional students, no provisions were made for different groups, there was no evidence within the instructional organization of any grouping strategies.

Also expressed at this meeting was concern of meeting the needs of the class as a whole, and of individuals in particular.

Several suggestions were made at this point that might help in maintaining classroom control and improve the learning atmosphere in the classroom. The suggestions are as follows:

1. Develop well-organized lesson plans; these plans should provide for whole class instruction, small group instruction, and for individuals that might require such preparation.
2. Know the materials to be covered in each lesson well before you begin your teaching. This may mean taking the material home with you to study and to prepare yourself for each lesson.
3. Develop activity learning centers that are interesting and challenging for the class.

4. Develop teacher-made supportive materials for your lessons.
5. Develop effective and efficient evaluating procedures to determine student growth.

/s/ Wm. J. Martin

EXHIBIT No. 8

December 4, 1979

Re: Bill Martin

The follow are notes from a classroom observation on December 4 in Mr. Martin's fourth grade from 8:45 to 9:35 a.m.:

1. At 8:45 the class was asked to move to their two math groups.

2. The math assignments for groups 1 and 2 were on the board.

3. Group 1 was working on a multiplication worksheet, and the teacher was working with group 2 correcting math examples from the textbook page 164.

   The teacher asked different students to read a problem and give the answer. This continued for most of the math period. He did occasionally, after completing a page, go around and give individual attention to some students.

4. At 9:10 Mr. Martin passed out math paper to group 1 to be used for pages 174-175 in their textbook.

5. Mr. Martin then continued to work with group 2. (Immediately after passing out the math paper to group 1, still 9:10.)

6. At 9:24 Mr. Martin stopped working with group 2 and then asked group 1 to turn to page 174. Then the following minute the teacher went back to work with group 2 and stayed with them until 9:35.

7. At 9:35 he told the students to put their math away because they went over their math period 5 minutes; and he asked the children to stand,

and they did some relaxing exercises for a few minutes at which time I left.

At no point during that period of observation did I see a lesson being taught by the teacher. The entire time seemed to be devoted to correcting homework assignments of group 2 and helping group 2 begin the next night's assignment. During this time group 1 basically was on their own.

For this particular math lesson, there appeared to be a lack of organization and preparation on the part of the teacher.

/s/ Wm. J. Martin

EXHIBIT NO. 11

December 13, 1979

Re: Bill Martin

On December 13, Mr. Martin and I met with Mr. Corcoran in his office. At that time Mr. Martin was given a paper containing information and suggestions based on a classroom observation made by Mr. Corcoran and myself on December 12.

The entire meeting focused on two areas. One area dealt with the problems and concerns relating to Bill's teaching, and the other area dealt with suggestions that might help Bill make improvements in his teaching.

Based on many observations in Bill's classroom, and after discussing these with him, Bill has yet to make, or to have, a thorough assessment of each student's abilities. Not having this essential information makes adequate planning very difficult and very often inappropriate for many of his students. In addition, the planning that is done lacks the basic essentials necessary in good lesson planning; namely: establishing specific goals to be achieved by the students, establishing the motivation techniques to be used for that particular lesson, developing a procedure to be followed in helping the students reach the specific goals, and establishing an evaluation process.

Suggestions were made to the effect that Bill make an educational assessment of each student so that he may adequately and appropriately plan to meet the needs of his class. In addition, a lesson form was given to Bill to assist him in his planning and organization.

Bill did indicate that, in his opinion, he was doing a good job and that he was doing the best he could with what he has.

/s/ Wm. J. Martin

EXHIBIT NO. 12

To: Bill Martin
From: A. John Crisafulli
Date: December 18, 1979

Several suggestions have been made in the past several weeks to assist you in resolving some concerns and problems that has arisen. Areas of concern and recommendations are as follows:

1. Complete thorough student assessments.
2. Lesson plans to date are incomplete—complete lesson plans.
3. Individualize student instruction.
4. Improve teaching strategies.
5. Improve communications with students and parents.

To further assist you in a supervisory manner, I would like to give you the following assignment:

A. In order to meet the educational needs of the class, I would like to have in my office, on or before January 2, a complete and thorough assessment of each student's abilities. Please use the attached form.

B. I would also like to have in my office by January 10, completed lesson plans for the next full week, using the lesson form that I gave to you on December 17, in the three major areas—math, reading, and language arts.

/s/ Wm. J. Martin

EXHIBIT NO. 15

January 3, 1980

Bill Martin
East School
Oak Street
Natick, Mass. 01760

Dear Bill:

I acknowledge your letter dated December 28 with reference to the individual assessments.

Please note that a teacher's marking procedure must be consistent with our school system grading policy. I am concerned with the statement: "I deliberately marked lower in order to motivate this class to work harder." Motivation should come from your varied instructional approaches which follow appropriate planning. Student interest is also developed by a challenging curriculum which should be presented. Deliberately marking a student lower than his level of performance is not acceptable.

Yours truly,

A. John Crisafulli
Principal

EXHIBIT NO. 17

Date 1/30/80

To: Bill Martin

From: A. John Crisafulli

Date: January 10, 1980

On January 9, Mrs. [.....], Mrs. [.....], Mrs. [.....] and Mrs. [.....] met with me to discuss concerns they have relative to the educational program their children are experiencing in your classroom. Three of the parents mentioned have expressed these concerns to me before, and I have shared them with you. These parents informed me that they were speaking for several other parents as well, and that an appointment with Dr. Keefe has been made for Monday, January 14, in order to discuss with him these concerns.

The parents' concerns at this time are as follows:

1. Work is not designed to challenge students at their ability levels.
2. There seems to be a lack of discipline within the classroom.
3. Not very many papers are going home; in those that do, the teacher's correction marks are not understood or helpful.
4. There is a lack of understanding of the teacher's grading system.
5. Children are unhappy.
6. There seems to be a lack of motivation.

I would like to bring to your attention the fact that these concerns have been shared with you in both written and verbal communication many times previously. Based

on several past observations in your classroom, I have shared with you many similar concerns.

In the past, several suggestions have been made that would correct or improve the above problem areas. If these suggestions were properly carried out, these concerns would probably no longer be with us.

Because these concerns are still a point of issue with the parents, and also with me, it might be helpful for you to review these suggestions in such a way that you might reorganize your preparation to better meet the needs of your class.

1. To make a complete and thorough student assessment. (You have done this as of January 1, 1980.

2. Group class according to levels of ability based on your January 2 assessments in math, reading and language arts areas.

3. Prepare and organize lessons to meet the educational needs of the above ability groups.

4. Participate actively in the lesson and activity.

5. Provide appropriate materials for exceptional students in your class.

6. Use a variety of instructional methods.

7. Develop teacher-made supportive materials for your lessons.

8. Develop effective and efficient evaluating procedures to determine student growth.

9. Effectively communicate the above student growth to parents.
10. To improve parent communication and understanding you might invite parents in to visit your classroom while in operation.
11. You might provide a folder for each child to carry home regularly so that parents would have an opportunity to be involved in checking the papers on an almost daily basis.

• • •

Q. Can you tell us what was said?

A. I thought that in a sense of order it might be appropriate if the parents were to speak in turn relative to any concerns that they had, which was the procedure that was followed. I would say that a summary of these concerns contained the following elements: (a) The parents' concern for the climate of the classroom; (b) parents' concern for the apparent lack of progress of their children in that classroom; (c) the parents' concern for what they saw as a lack of challenge to the students in that classroom; (d) the parents' concern with what they saw as an inability on the part of the teacher to communicate to them on those occasions when they had sought his advice and counsel in what we term "parent-teacher conferences" and (e) the parents' concern that there was a lack of consistency, if I may use those terms, regarding the grading system that the teacher was using.

Q. Maybe you could elaborate on that last one for a moment.

MR. WRIGHT: Objection.

A. I can cite two instances that arise in my mind. In one case the parents' concern had to do with the fact that after the parent had been to see the teacher to express some concern about what the grades meant in relationship to what was on the paper, that subsequently the parent alleged that the grades seemed to go up. In a second instance the parent showed me a paper that had been done by a child, completed rather by a child, and the parent felt that the grade on the paper had no relationship, whatsoever, to the quality of the work that appeared on it.

Q. You say the meeting lasted approximately an hour?

A. Yes, sir.

Q. What if any conclusion did you subsequently reach relative to the continued presence of Mr. Martin in his classroom?

A. Following the meeting with the parents I sat down with Mr. Corcoran, who had also participated in this particular event, and we reviewed all of the information which we had relative to Mr. Martin's performance in the classroom. Based upon my judgment as a professional educator I concluded that an *intolerable situation* existed in the fourth grade classroom in the East Natick School taught by Mr. William Martin, and that as Superintendent of Schools and the individual responsible, as the Chief Executive Officer, I had to take an action that would remove Mr. Martin from the classroom immediately.

• • •

Q. But you are saying, and under oath, sir, that you did tell Mr. Keough that there were complaints by teachers that were made to you on the 14th of January?

MR. AXTEN: By teachers?

MR. WRIGHT: I am sorry, by parents.

A. I indicated to Mr. Martin and Mr. Keough, who was present as Mr. Martin's attorney, that in my opinion conditions in the fourth grade classroom at the East Natick School, which up to that point in time was under the direction of Mr. Martin, had reached an intolerable level.

• • •

Q. Now, on January 21 there was another meeting in your office; is that true?

A. That is correct.

Q. Who was present at that time?

A. Mr. Martin and yourself, sir, in lieu of Mr. Keough, who, you alerted us, was unfortunately in the hospital.

Q. Where was that meeting held?

A. My office.

Q. What was discussed during that meeting, sir?

A. Well, if memory serves me, I believe you requested that I review the several options with you, which I believe I did, and I cannot recreate the entire conversation. I think you made the statement to the effect that Mr. Martin would not resign.

Q. Was there any discussion, sir, of any misconduct on the part of the employee at that meeting?

A. I indicated to both of you that in my opinion an intolerable situation had arisen in the fourth grade class at East Natick School.

Q. It is your testimony that you said that, sir, to me?

A. It is my belief I made a statement very similar to that, and I believe that at least on two occasions I used the term "intolerable," once in the presence of Mr. Keough, which was on Wednesday morning, and again, to the best of my knowledge, on Friday morning.

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT

NO. 80-1075

MIDDLESEX: SS

WILLIAM J. MARTIN

PLAINTIFF

VS.

DIGHT W. CRAIN, ET AL

DEFENDANTS

AFFIDAVIT OF WILLIAM J. MARTIN

I, William J. Martin, based on personal knowledge, depose and say the following:

• • •

16. On January 24, 1980, I was notified in writing that the reason I had been suspended for five (5) days by Dr. Keefe was due to my grading procedure, alleged inefficiency and incapacity as a teacher.

• • •

Signed under the pains and penalties of perjury this ..... day of March 1983.

/s/ William J. Martin

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT

NO.

MIDDLESEX, SS

WILLIAM J. MARTIN, PLAINTIFF

VS.

DIGHT W. CRAIN, PETER H. GARLAND,
J. VINCENT SAUNDERS,
MARSHALL LEBOWITZ, MARK H. RAIDER,
PAUL AMBLER AND PAMELA J. KAUFMANN
AS THEY ARE MEMBERS OF THE NATICK
SCHOOL COMMITTEE AND
JOSEPH A. KEEFE, SUPERINTENDENT OF
SCHOOLS OF THE TOWN OF NATICK

COMPLAINT

1.) The Plaintiff William J. Martin is a resident of Natick in the County of Middlesex, and is employed as a tenured school teacher in the Natick School system, having been employed in such position since 1959.

2.) The Defendants Dight W. Crain, Peter H. Garland, J. Vincent Saunders, Marshall Lebowitz, Mark H. Raider, Paul Ambler and Pamela J. Kaufmann are all residents of the Town of Natick, Middlesex County, Massachusetts, and constitute the duly elected School Committee of the Town of Natick and the Defendant Joseph A. Keefe, Superintendent of Schools in the Town of Natick.

3.) That on January 9, 1980 the Plaintiff requested grievance forms from the Natick Education Association, and notified the Association that he intended to file a grievance against John Crisafulli, who was the Principal at the

East School in Natick, where the Plaintiff was employed as a fourth grade teacher.

4.) That on January 15, 1980 the Plaintiff notified Jean Burke, President of the Natick Teachers Association that he wished the Natick Teachers Association to represent him in filing a grievance against Mr. Crisafulli, the Principal of the school.

5.) That on January 18, 1980 Joseph A. Keefe, the Natick Superintendent of Schools, advised the Plaintiff that the Plaintiff had been relieved of his duties as a school teacher in the Town of Natick, and further advised the Plaintiff that he *must* resign his position as a teacher in the Natick Public School system. No reason was given by Dr. Keefe for this administrative action, but, the Plaintiff was told by Dr. Keefe if he did not resign or take a leave of absence by January 21, 1980, he would be fired.

6.) That on January 21, 1980 Joseph A. Keefe, Superintendent of Schools in the Town of Natick, notified the Plaintiff that he had been suspended by the Superintendent of Schools under the provisions of General Laws Chapter 71, Section 42(d) for the week of January 21 thru January 25, 1980.

7.) That on January 21, 1980 the Plaintiff through his attorney, Paul J. Keough requested a hearing on the suspension imposed by the Superintendent for the period January 21 thru January 25, 1980.

8.) That *no hearing* on the suspension for the period January 21 thru January 25, 1980 has ever been granted by the Petitioner.

9.) That the Plaintiff through his attorney, Paul J. Keough, requested a hearing under the provisions of General Laws, Chapter 42(d) on the contemplated additional suspension by the School Committee.

10.) That on January 24, 1980 the Plaintiff was notified by Joseph A. Keefe, Superintendent of School and Secretary of the Natick School Committee, that the Natick School Committee of it meeting on January 29, 1980, intended to vote whether or not to suspend the Plaintiff for the (3) reasons contained in the notification which is attached to and made part of this Complaint.

11.) That on January 29, 1980 a suspension hearing was held before the Natick School Committee on the contemplated additional suspension. That said hearing was commenced at 8:00 P.M. on January 29, 1980, and adjourned on January 30, 1980 at 12:30 A.M.

12.) That the suspension hearing in front of the Natick School Committee was resumed on January 30, 1980 at 7:00 P.M., and that it was ended at 1:40 A.M. on January 31, 1980.

13.) That approximately 11:55 P.M. on January 30, 1980, attorney for the Plaintiff advised the Natick School Committee that because of fatique and ineffectiveness and the lateness of the hour, he would be unable to continue with the hearing beyond 1:00 A.M. on January 31, 1980.

14.) That on 1:00 A.M. on January 31, 1980 the attorney for the Plaintiff advised the Natick School Committee that he was not finished with the cross examination of the School Committee's witnesses, and that he wished to present witnesses on behalf of the Plaintiff, and requested a continuance of the hearing.

15.) The School Committee at approximately 1:00 A.M. on January 31, 1980 voted to continue the hearing in the *absence* of the Plaintiff and his counsel, who was unable to continue because of fatigue, and exhaustion.

16.) That at 1:00 A.M. on January 31, 1980 the Plaintiff and his counsel left the School Committee meeting.

17.) That thereafter the School Committee called witnesses in the absence of the Plaintiff, and continued the hearing, and at 1:40 A.M. on January 31, 1980 without the Plaintiff being present, or having the opportunity to call witnesses in his behalf, voted to suspend the Plaintiff for (30) days.

18.) That the School Committee has never given the Plaintiff a *hearing* on his suspension for the period January 21, 1980 to January 25, 1980.

19.) That the notification dated January 24, 1980 was insufficient notice to the Plaintiff for the hearing held January 29, 1980, and not in compliance with the provisions of General Laws, Chapter 71, Section 42(d).

20.) That the refusal of the School Committee to allow the Plaintiff to present witnesses in his behalf, was in violation of General Laws, Chapter 71, Section 42(d).

21.) That the vote of the School Committee in refusing to allow a continuance to the Plaintiff of the hearing after six late evening and early morning hours was arbitrary, unreasonable and in violation of due process of law.

22.) That the actions of the School Committee in the absence of the Plaintiff or the Plaintiff's attorney after his departure on January 31, 1980 at 1:00 A.M., was arbi-

trary, unreasonable and in violation of the Plaintiff's rights under General Laws, Chapter 71, Section 42(d).

23.) That an actual controversy has arisen between the Plaintiff and the Defendant as to whether the action of the Defendants in refusing the Plaintiff a hearing on his suspension of January 21, 1980 to January 25, 1980 was in violation of General Laws, Chapter 71, Section 42(d).

24.) That an actual controversy has arisen between the Plaintiff and the various Defendants as to whether the action of the Defendants in suspending the Plaintiff from his position as a school teacher in the Town of Natick for a thirty day period beginning January 31, 1980 thru February 29, 1980 was in violation of General Laws, Chapter 71, Section 42(d).

25.) That the suspension imposed by the Defendant School Committee was not justified.

WHEREFORE, the Plaintiff demands:

1.) That a Declaratory Judgment be made as to the rights of the various parties resolving the controversies set forth in paragraphs 23 and 24 of this Complaint.

2.) That a Judgment be granted that the suspension of January 20 thru January 25, 1980 was in violation of M.G.L. 71 42(d).

3.) That a Judgment be granted that the hearing held on January 30, 31, 1980 violated M.G.L. 71 42(d), the fourteenth Amendment of the United States Constitution and the Massachusetts Constitution, Part I, Articles 10 and 11.

4.) That the Defendants, their agents, servants and employees be directed to return Plaintiff to the position he held at the beginning of the 1979-1980 school year.

5.) That the defendants, their agents, servants or employees be directed to pay Plaintiff for the periods he was suspended.

6.) That the Plaintiff be awarded his costs and reasonable attorneys fees for bringing this action.

7.) And for such further relief this Court may deem just and equitable.

By His Attorney,
/s/ William C. Wright, Jr.
5 Main Street
Natick, MA 01760
Tel. (617) 653-8141
Date: February 29, 1980

MOTION FILED
APR 1 1985

(3)

No. 84-1432

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

WILLIAM J. MARTIN,
Petitioner,

v.

DIGHT W. CRAIN, et al.,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Judicial Court
of the Commonwealth of Massachusetts

MOTION TO INTERVENE AND RESPONDENT-INTERVENOR'S BRIEF IN OPPOSITION

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38 pp

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MOTION TO INTERVENE

Francis X. Bellotti, the Attorney General of the Commonwealth of Massachusetts, moves, pursuant to 28 U.S.C. § 2403(b) and Rule 28.4(c) of the Rules of this Court,[1/] to intervene in the

1/ The petitioner served the petition on the Attorney General, as required by Rule 28.4(c), but failed to recite in the petition that 28 U.S.C. § 2403(b) may be applicable, as further required by that rule.

above-captioned case, in which a petition for a writ of certiorari is presently pending before this Court. As grounds for this motion, the Attorney General states that the petition for certiorari calls into question the constitutionality of Mass. Gen. Laws Ann. c. 71, § 42D, a state statute affecting the public interest.

The Attorney General did not intervene in the state trial court because the question of the constitutionality of the statute was not raised by the parties, and the Attorney General therefore was not notified of the pendency of the case. See Mass. Gen. Laws Ann. c. 231A, § 8; Mass. R. Civ. P. 24(d). After the trial court, sua sponte, held unconstitutional a portion of Mass. Gen. Laws Ann. c. 71, § 42D, the Attorney General participated as amicus curiae in the Supreme

Judicial Court of the Commonwealth in support of the constitutionality of the statute.

As chief law officer of the Commonwealth, the Attorney General's interest in this case is to uphold the facial constitutionality of chapter 71, section 42D, of the General Laws of the Commonwealth. That interest is not adequately represented by the respondents, who are primarily interested in defending the constitutionality of the statute as applied in this case.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

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(617) 727-1001
Counsel of Record

Date: March 12, 1985

QUESTION PRESENTED

Whether a state statute that authorizes a school administrator to suspend a teacher for five days or less for any reason that the administrator deems adequate creates a constitutionally protected property interest in avoiding such suspensions.

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No. 84-1432

IN THE
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WILLIAM J. MARTIN,
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Respondents.

On Petition for a Writ of Certiorari
to the Supreme Judicial Court
of the Commonwealth of Massachusetts

RESPONDENT-INTERVENOR'S BRIEF IN OPPOSITION

Francis X. Bellotti, the Attorney General of the Commonwealth of Massachusetts, the respondent-intervenor,[1/] re-

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1/ The Attorney General has moved to intervene in this case pursuant to 28 U.S.C. § 2403(b) and Rule 28.4(c) of the Rules of this Court on the ground that the petition for a writ of certiorari

(footnote continued)

spectfully requests that this Court deny the petition for a writ of certiorari to review the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts in this case.

STATEMENT OF THE CASE

The respondent-intervenor adopts the statement of the case contained in the respondents' brief in opposition to the petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

As provided in Rule 17 of the Rules of this Court, "review on writ of certiorari is not a matter of right, but of

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(footnote continued)

calls into question the constitutionality of Mass. Gen. Laws Ann. c. 71, § 42D, a state statute affecting the public interest.

judicial discretion, and will be granted only when there are special and important reasons therefor."[2/] No such "special and important reasons" warrant the granting of that extraordinary writ in this case. Furthermore, there are several reasons why granting the writ in this case would be particularly inappropriate.

2/ See also Ross v. Moffitt, 417 U.S. 600, 617 (1974); Hammerstein v. Superior Court, 341 U.S. 491, 492 (1951); Wade v. Mayo, 334 U.S. 672 (1948).

I. THE DECISION OF THE SUPREME JUDICIAL COURT IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND WITH THOSE OF OTHER STATE COURTS OF LAST RESORT AND FEDERAL COURTS OF APPEALS.

A. A Massachusetts Teacher Has No Constitutionally Cognizable Property Interest In Avoiding A Suspension Of Five Days Or Less.

As stated by this Court in Board of Regents v. Roth, 408 U.S. 564, 569 (1972), "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." "While no State may 'deprive any person of life, liberty, or property, without due process of law,' it is well settled that only a limited range of interests fall within this provision." Hewitt v. Helms, 459 U.S. 460,

466 (1983). Therefore, the threshold determination that must be made in this or any other procedural due process case is whether the interest in question constitutes a constitutionally protected liberty or property interest.[3/] Only if it is determined that such an interest exists, does the question arise of what process is constitutionally due.

In this case, the Supreme Judicial Court correctly determined that Martin had no legitimate claim of entitlement to avoiding his five-day suspension.[4/]

3/ The recently decided case of Cleveland Bd. of Educ. v. Loudermill, 53 U.S.L.W. 4306 (U.S. Mar. 19, 1985), has no direct bearing on this question, since in that discharge case, unlike the present matter relating to a brief suspension, it was undisputed that the employee possessed a property interest. Id. at 4307.

4/ Martin apparently no longer claims to have been deprived of a liberty interest. Pet. 6-11.

Pet. 6a-7a.[5/] In making that determination, the Supreme Judicial Court correctly looked to state law. Pet. 6a. As held by this Court, property interests "are created and their dimensions are defined by . . . state law." Board of Regents v. Roth, 408 U.S. at 577. "To have a property interest in a benefit,

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5/ The Supreme Judicial Court's construction of this state statute as creating "no statutory right or legitimate claim of entitlement to continued employment which made [Martin] immune from the type of short suspension described in § 42D," Pet. 7a, is binding on this Court. See Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9-11 (1978) (Court looks to state decisional law for definition of interest in question); cf. Mills v. Rogers, 457 U.S. 291, 306 (1982) (remanding for possible certification to state court of question whether a state-created liberty interest exists); Bishop v. Wood, 426 U.S. 341, 345-46 (1976) (in the absence of an authoritative interpretation of state law by a state court, Supreme Court defers to construction of local federal court, "even if an examination of the state-law issue without such guidance might have justified a different conclusion").

a person . . . must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Id. See also Cleveland Board of Education v. Loudermill, 53 U.S.L.W. at 4307. Whether a person has a legitimate claim of entitlement, or merely a unilateral expectancy, depends upon how state law defines the substantive interest in question. Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 465 (1981).

An examination of the state statute governing suspensions of five days or less, Mass. Gen. Laws Ann. c. 71, § 42D, Pet. 31a-32a, reveals that, as authoritatively construed by the highest court of the state, that statute creates no legitimate claim of entitlement to avoiding such brief suspensions. Two aspects of

this statute make it unreasonable for a teacher to rely on it as creating such an entitlement: the absence of specific, objective standards for imposing such suspensions and, conversely, the presence of unfettered discretion on the part of school administrators to impose such suspensions "for any . . . cause which such . . . official deems adequate." Mass. Gen. Laws Ann. c. 71, § 42D.

With respect to the absence of standards in the statute, this Court has repeatedly held that a benefit does not rise to the level of a constitutionally cognizable property interest unless it is "defeasible only upon proof of specific acts of misconduct." Meachum v. Fano, 427 U.S. 215, 226 (1976). See also Vitek v. Jones, 445 U.S. 480, 490-91 (1980); Hewitt v. Helms, 459 U.S. at 472;

Barry v. Barchi, 443 U.S. 55, 64 n. 11 (1979). For example, in Goss v. Lopez, 419 U.S. 565 (1975), the Court found that a student had a property interest in avoiding a 10-day suspension from school because, under state law, such suspensions could be imposed only on specified grounds. Id. at 573-74. On the other hand, "[i]f the decisionmaker is not 'required to base its decisions on objective and defined criteria,' but instead 'can [act] for any constitutionally permissible reason . . .,'" no legitimate claim of entitlement exists. Olim v. Wakinekona, 461 U.S. 238, 249 (1983) (quoting Dumschat, 452 U.S. at 467 (Brennan, J., concurring)).

This general principle has been applied in cases involving public employment. For example, in Fredericks v.

Vartanian, 694 F.2d 891, 892 (1st Cir. 1982), the court held that no property interest in state employment exists in the absence of a state law provision guaranteeing "'that a particular employment relationship will continue unless certain defined events occur.'" Thus, where a state statute specifies that an employee may be removed or suspended only for "good cause" or "sufficient cause" or specific, objective reasons, then a property interest in continued employment has been found to exist.[6/] However,

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6/ See, e.g., Arnett v. Kennedy, 416 U.S. 134, 181 (1974) (White, J., concurring in part and dissenting in part) ("such cause as will promote the efficiency of the service"); Perry v. Sindermann, 408 U.S. 593, 602 (1972) ("sufficient cause"); Loudermill, 53 U.S.L.W. at 4307 (state statute specifying permissible causes for dismissal creates a

(footnote continued)

where, as in this case, suspension is permitted for any subjectively sufficient reason, no legitimate claim for entitlement to uninterrupted employment, and hence no property interest, exists.[7/]

Since the statute in question here not only fails to specify the causes for

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(footnote continued)

property interest); Best v. Boswell, 696 F.2d 1282, 1289-90 (11th Cir.), cert. denied, 104 S. Ct. 103 (1983) ("improper behavior"). But see Bishop v. Wood, 426 U.S. at 344-45 (statute containing specific grounds for discharge nevertheless construed to permit discharge "at will" of employer and therefore created no property interest).

7/ See, e.g., Board of Regents v. Roth, 408 U.S. at 577-78 (where no provision guaranteed employment "absent 'sufficient cause,'" no legitimate claim of entitlement); Bleeker v. Dukakis, 665 F.2d 401, 403 (1st Cir. 1981) (no property interest where employers could dismiss employee if "in their judgment, he did not perform satisfactorily").

which a teacher may be suspended, but also permits suspension for any cause deemed adequate by the school administrators, it creates no justifiable expectation of avoiding suspension where, in the administrators' subjective view, a suspension is warranted. Therefore, no property interest in avoiding the brief suspensions authorized by Mass. Gen. Laws Ann. c. 71, § 42D, can be held to exist.

A second, intimately related aspect of this statute that forecloses any legitimate claim of entitlement arising from it is its unfettered grant of discretion to school administrators to determine when a suspension is warranted. It is well-settled that discretion negates any claim of entitlement which would mandate the protection of the Due

Process Clause.[8/]

As cogently explained by the Court of Appeals for the First Circuit, a provision which permits an employer to suspend or remove an employee who does not meet the employer's subjective standards of competence does not provide an employee

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8/ See Meachum v. Fano, 427 U.S. at 227-28 (where prison officials have discretion to transfer prisoners, prisoner has no legitimate expectation of remaining at a particular prison); Olim v. Wakinekona, 461 U.S. at 249 (same); Packish v. McMurtrie, 697 F.2d 23, 25 (1st Cir. 1983) (where statutory right to indemnification is discretionary, no property interest in indemnification exists); Loudermill, 53 U.S.L.W. at 4309 n. 8 ("where state conduct is entirely discretionary the Due Process Clause is [not] brought into play"); Bleeker v. Dukakis, 665 F.2d at 403 (wide discretion that employment contract granted to government established lack of property interest in remaining employed).

> with any basis for "rely[ing] reasonably on remaining employed," . . . when faced with an employer wishing to fire him. This lack of any reasonable expectation of continued employment suffices to establish the lack of "property" in the constitutional sense, and hence the lack of a viable due process claim.

Bleeker v. Dukakis, 665 F.2d at 403. "[T]he more circumscribed is the government's discretion . . . to withhold a benefit, the more likely that benefit constitutes 'property,' for the more reasonable is reliance upon its continued availability." Beitzell v. Jeffrey, 643 F.2d 870, 874 (1st Cir. 1981). Conversely, where broad discretion exists to deny or terminate a benefit, "the requisite mutual understanding" to create an entitlement is absent. Leis v. Flynt, 439 U.S. 438, 443 (1979).

In this case, there can be little doubt that the statute in question, by its plain language, vests broad discretion in school administrators by authorizing them to impose suspensions of five days or less "for any . . . cause which [they] deem[] adequate." Mass. Gen. Laws Ann. c. 71, § 42D. Similar language has consistently been construed to grant a degree of discretion sufficient to negate a claim of entitlement. For example, in Bleeker v. Dukakis, 665 F.2d at 403, where an employment contract permitted dismissal of an employee by his employers "if, in their judgment he did not perform satisfactorily," the court held that "[t]his criterion for dismissal is sufficiently broad and subjective to warrant characterizing [plaintiff's] employment contract as one that . . . allowed for

removal 'at will'" and therefore created no property interest in employment.

In sum, the statute at issue here evinces no legislative intent to create a property interest in avoiding suspensions of five days or less. Any interest that Martin may have had in avoiding his five-day suspension was "a mere subjective 'expectancy,'" which is therefore not protected by the Due Process Clause. See Perry v. Sindermann, 408 U.S. at 603.

Moreover, even if some property interest in avoiding a five-day suspension could be identified, it would be so minimal that it would not rise to the level of "property" in the constitutional sense. In Goss v. Lopez, 419 U.S. 565, 576 (1975), this Court noted that where a property deprivation is de minimus, no

account need be taken of the Due Process Clause. In that case, the deprivation in question, a ten-day suspension of a child from school, was found to be more than de minimus because a "total exclusion from the educational process . . . is a serious event in the life of the suspended child." Id. The same cannot be said of a teacher's suspension, which amounts only to a brief interruption of income. Since any deprivation of property incurred by Martin was de minimus at best, no process was due.

This conclusion not only follows inexorably from the above application of traditional due process analysis, but also comports with common sense and sound public policy. A holding to the contrary would involve courts unduly in the discretionary decisions that are the day-to-

day business of school administrators. As held by this Court, a "court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. . . . The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions." Bishop v. Wood, 426 U.S. at 349-50.

B. The Procedures Afforded In This Case Amply Satisfy Constitutional Due Process Requirements.

Assuming, contrary to the above arguments, that Martin was deprived of a constitutionally cognizable property interest, he would be entitled only to minimal procedural safeguards. As held by this Court, "'due process is flexible and

calls for such procedural protections as the particular situation demands.'" Mathews v. Eldridge, 424 U.S. 319, 334 (1976). A determination of what process is "due" in a particular case "requires analysis of the governmental and private interests that are affected." Id. See also Loudermill, 53 U.S.L.W. at 4307-08.

In this case, the private interests involved are minimal. The suspension at issue was only five days long.[9/] As held in Mathews v. Eldridge, "'the possible length of wrongful deprivation of . . . benefits is an important factor in assessing the impact of official action on the private interests.'" Id. at 341. See also Mackey v. Montrym, 443 U.S. 1,

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9/ Compare Best v. Boswell, 696 F.2d at 1290 (two-week suspension under statute permitting summary suspensions of up to 30 days).

12 (1979). Furthermore, a brief and "temporary interruption of income . . . [is] considerably less severe than . . . termination of welfare benefits . . . in the face of 'brutal need,'" Arnett v. Kennedy, 416 U.S. at 168; total exclusion of a child from school, Goss v. Lopez, 419 U.S. at 576; "cessation of essential services" such as water or heat, Memphis Light, Gas & Water Division v. Craft, 436 U.S. at 20; or termination of employment. Loudermill, 53 U.S.L.W. at 4306.

On the other hand, the government's interests in imposing brief suspensions where they are deemed to be warranted are substantial. As recognized by this Court,

> the Government's interest, and hence the public's interest, is the maintenance of employee efficiency and discipline. Such factors are essential if the

> Government is to perform its responsibilities effectively and economically. To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch.

Arnett v. Kennedy, 416 U.S. at 168. See also Connick v. Myers, 461 U.S. 138, 147 (1983).

Since the substantial governmental interests at stake here far outweigh the minimal private interests involved, only rudimentary procedural safeguards would be called for if a deprivation of liberty or property had occurred. Cf. Loudermill, 53 U.S.L.W. at 4308-09 (finding that government's interests in summarily terminating employee were outweighed by employee's interest in avoiding deprivation of the means of livelihood, which

the Court characterized as a severe deprivation).[10/] Since, as recognized by the Supreme Judicial Court, Martin was afforded ample due process protection here, Pet. 8a, no constitutional violation occurred.

In sum, the Supreme Judicial Court correctly upheld the constitutionality of Mass. Gen. Laws Ann. c. 71, § 42D. Not only is that holding consistent with prior decisions of this Court and the federal courts of appeals, as discussed above, but it is also consistent with the holdings of other state courts upholding the constitutionality of similar

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10/ The question of whether Martin was afforded sufficient procedural protection prior to his subsequent discharge is not presented here. His discharge, first as part of a reduction in force and then for cause, is the subject of two later cases which are still pending in the state courts.

statutes.[11/] Accordingly, granting of the extraordinary writ of certiorari is not warranted in this case under Rule 17(b) or (c).

II. THE IMPORTANT QUESTION OF FEDERAL LAW POSED BY THE PETITIONER NEED NOT BE REACHED IN THIS CASE.

The broad question of whether a statute permitting the suspension of a teacher for five days or less without any notice or hearing is facially unconstitutional, Pet., Questions Presented, No. I, need not be reached in this case. As recognized by the Supreme Judicial Court, this case can be resolved on nar-

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11/ See, e.g., Wilson v. Minneapolis, 283 Minn. 348, 168 N.W.2d 19, 23 (1969); Yantsin v. Aberdeen, 54 Wash. 2d 787, 345 P.2d 178 (1959); Umholtz v. Tulsa, 565 P.2d 15 (Okla. 1977); People v. Ruddell, 1 Ill. App. 3d 662, 274 N.E.2d 835 (1971).

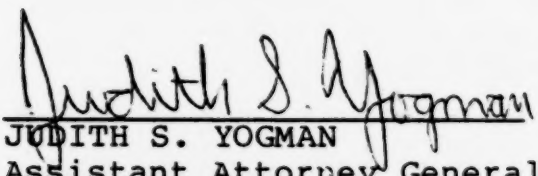
rower grounds, since Martin was given a hearing immediately following his five-day suspension and was also given notice of the reasons for his suspension. Pet. 6a. Accordingly, as stated by the Supreme Judicial Court, the broader constitutional questions posed by Martin "must await another day." Pet. 6a. For this reason, as well, granting of this petition is unwarranted under Rule 17(c).

CONCLUSION

For the above reasons, this Court should deny the petition for a writ of certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL



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Supreme Court, U.S.
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No. 85-1432.

In the

Supreme Court of the United States.

OCTOBER TERM, 1984.

WILLIAM J. MARTIN,
PETITIONER,

v.

DIGHT W. CRAIN, PETER H. GARLAND, J. VINCENT SAUNDERS, MARSHALL LEBOWITZ, MARK H. RAIDER, PAUL AMBLER, AND PAMELA J. KAUFMAN, AS THEY ARE MEMBERS OF THE NATICK SCHOOL COMMITTEE AND JOSEPH A. KEEFE, SUPERINTENDENT OF SCHOOLS OF THE TOWN OF NATICK,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Petitioner's Reply Brief.

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No. 85-1432.

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RESPONDENTS.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Petitioner's Reply Brief.

Reasons for Submitting Supplemental Brief.

This brief is written pursuant to Rule 25(5) as a supplement to petitioner's petition for certiorari which was filed with this

Court on March 7, 1985. This brief is supplied as a result of a decision issued by this Court on March 19, 1985, *Cleveland Board of Education* v. *Loudermill,* 53 U.S.L.W. 4306 (U.S. Mar. 19, 1985). *Loudermill* was decided twelve (12) days after petitioner's petition for certiorari was filed with this Court on March 7, 1985 and eight (8) days after the deadline established by statute, March 10, 1985, for filing the same. The decision in *Loudermill* also renders advisable a response pursuant to Rule 24(4) to issues raised by the respondents, Natick School Committee, and, in particular, to the respondent-intervenor, Francis X. Bellotti, the Attorney General of the Commonwealth of Massachusetts.

BECAUSE PETITIONER MARTIN AS A TENURED TEACHER WITHIN THE MEANING OF M.G.L. c. 71, § 42 HAS A PROPERTY INTEREST IN CONTINUING EMPLOYMENT, HE HAS A PROPERTY INTEREST IN THE FIVE DAYS THAT HE WAS SUSPENDED ACCORDING TO *Loudermill*.

A. *Because Chapter 71, § 42 Provides that Martin Cannot be Dismissed Except Upon "Cause" He Has a Property Interest in His Continued Employment.*[1]

The Attorney General of the Commonwealth concedes the constitutional axiom that a citizen possesses an expectancy, or a property interest, if the deprivation of such inteest is conditioned upon a showing of "cause." Attorney General's Brief in Opposition, pp. 8-11, and cases cited therein.

Moreover, the Supreme Judicial Court, the highest court of the Commonwealth, has recognized that a tenured teacher has a property interest in continued employment by virtue of

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[1] Pet. 6.

M.G.L. c. 71, § 42. In the instant case, the Supreme Judicial Court stated: "[i]t is without dispute that Martin was a tenured teacher . . . . entitled to the protection that State law affords to those who have attained that status." *Martin* v. *School Committee of Natick,* 393 Mass. 430, 434 (1984).

B. Loudermill *Supports the Proposition that If a Tenured Teacher Has a Property Interest in Continued Employment, He Also Has a Property Interest in the Days Lost in a Short Suspension.*

In *Cleveland Board of Education* v. *Loudermill, supra,* this Court held that two tenured Ohio civil servants were entitled to certain pre-termination procedures notwithstanding the fact that the Ohio Civil Service Statute did not provide such pre-deprivation procedures. *Loudermill* expressly rejected the position of the plurality in *Arnett* v. *Kennedy,* 416 U.S. 134 (1974) that a public employee's expectancy in continued employment is limited by the statutory procedures which protect it. *Loudermill, supra* at 4307.[2]

The Court concluded that in most situations, due process procedures shall include at the very least "a pretermination opportunity to respond coupled with post-termination administrative procedures." 53 U.S.L.W. at 4310. Moreover, continues the Court, in situations like the case *sub judice,* where the suspension, not the termination, of a tenured employee is at issue, constitutional protections still cannot be abandoned. This is so, said the Court, even where the supsension is necessitated by an emergency obviating the possibility of pre-termination procedures:

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[2] Certainly *Loudermill* eliminates the possibility of arguing that solely because M.G.L. c. 71, § 42D does not identify procedures relative to a five-day suspension that no procedures are constitutionally mandated.

> Finally, in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending *with pay* . . . . (Emphasis added.)

53 U.S.L.W. at 4309.

Obviously, the Court's mandate that even the necessary preemptory suspension of a tenured employee be accomplished "with pay" indicates that a tenured employee has a property interest in each and every day that he or she is employed. To put it another way, "[O]nce a property interest is created, it cannot be removed completely or in chunks." (Pet 8.)

It is critical to note that in its approach to preemptory suspension this Court does not adopt the proposition advanced by the Attorney General[3] that a property interest does not attach in the suspension of a tenured employee unless state law requires an additional showing of "cause" in connection with such suspension.

C. Loudermill *Supports the Proposition that the Property Involved in the Five-Day Suspension is Not De Minimus.*

The requirement in *Loudermill* that an employee be compensated during a summary suspension undercuts the Attorney General's argument that a five-day suspension implicates only a *de minimus*[4] loss of property. The Supreme Court did not limit its mandate that preemptory suspensions be accomplished "with pay" to only those suspensions exceeding a specific number of days. On the contrary, in *Loudermill* the Court has established that the suspension of a public employee for even

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[3] Attorney General's Brief in Opposition.

[4] Pet. 9.

one day or less implicates a protectable property interest. In addition, the Supreme Court has recognized in *Parratt* v. *Taylor*, 451 U.S. 527, 536-537 (1981), that a hobby kit valued a mere $23.50 constitutes property adequate to warrant Fourteenth Amendment safeguard. The parties stipulated before the state trial court that the lost pay amounted to $523.75.[5]

Finally, *Loudermill* attaches much more significance to the deprivation of the livelihood of a United States citizen than does the Attorney General of the Commonwealth. The Attorney General claims that the temporary suspension of a student from his education is a more serious event than the temporary suspension of a teacher because the latter results only in a "brief interruption of income." Brief in Opposition, p. 17. On the other hand, the *Loudermill* Court concludes:

> [t]he significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood.

53 U.S.L.W. at 4308.

Certainly, if the ten-day suspension of a child from school is recognized "is a serious event in the life of a suspended child,"[6] then it can be appreciated that the multiple day suspension of the individual who provides this education to a whole classroom of children constitutes a very fundamental right indeed.

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[5] While not reproduced in the record-appendix before the Supreme Judicial Court the parties stipulated before the trial court on the amount of pay lost to Martin on account of his five-day suspension. (A. 1.)

[6] Attorney General's Brief in Opposition, p. 17, citing *Goss* v. *Lopez* at 576.

Conclusion.

For the reasons stated herein, the Court should grant certiorari and reverse the judgment of the Supreme Judicial Court.

Respectfully submitted,

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**Counsel of Record*

Appendix.

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX, SS.

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 80-1075

WILLIAM J. MARTIN,
Plaintiff,

v. STIPULATION RE: DAMAGES

DIGHT W. CRAIN, et al.,
Defendants.

The parties hereby stipulate and agree that if defendants are liable for any damages in connection with the 5-day suspension of plaintiff William J. Martin from January 21 to January 25, 1980, any such liability would be in the total amount of $523.75. Accordingly, the parties request the Court to enter final judgment as requested in the Joint Motion for Entry of Final Judgment, submitted herewith.

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By his attorneys,

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No. 84-1432

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

WILLIAM J. MARTIN,
Petitioner,

v.

DIGHT W. CRAIN, et al.,
Respondents.

On Petition for a Writ of
Certiorari to the Supreme
Judicial Court for the
Commonwealth of Massachusetts

MOTION TO INTERVENE

Francis X. Bellotti, the Attorney General of the Commonwealth of Massachusetts, moves, pursuant to 28. U.S.C. § 2403(b) and Rule 28.4(c) of the Rules of this Court,[1] to intervene in the above-captioned case, in which a petition for a writ of certiorari is presently pending before this Court. As grounds for this motion, the Attorney General states that the petition for certiorari calls into question the constitutionality of Mass. Gen. Laws Ann. c. 71, § 42D, a state statute affecting the public interest.

The Attorney General did not intervene in the state trial court because the question of the constitutionality of the statute was not raised by the parties, and the Attorney General therefore was not notified of the pendency of the case. See Mass. Gen. Laws Ann. c. 231A, § 8; Mass. R. Civ. P. 24(d). After the trial court, sua sponte, held unconstitutional a portion of Mass. Gen. Laws Ann. c. 71, § 42D, the Attorney General participated as amicus curiae in the Supreme Judicial Court of the Commonwealth in support of the constitutionality of the statute.

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[1] The petitioner served the petition on the Attorney General, as required by Rule 28.4(c), but failed to recite in the petition that 28 U.S.C. § 2403(b) may be applicable, as further required by that rule.

As chief law officer of the Commonwealth, the Attorney General's interest in this case is to uphold the facial constitutionality of chapter 71, section 42D, of the General Laws of the Commonwealth. That interest is not adequately reqpresented by the respondents, who are primarily interested in defending the constitutionality of the statute as applied in this case.

Respectfully sbumitted,

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Dated: March 12, 1985